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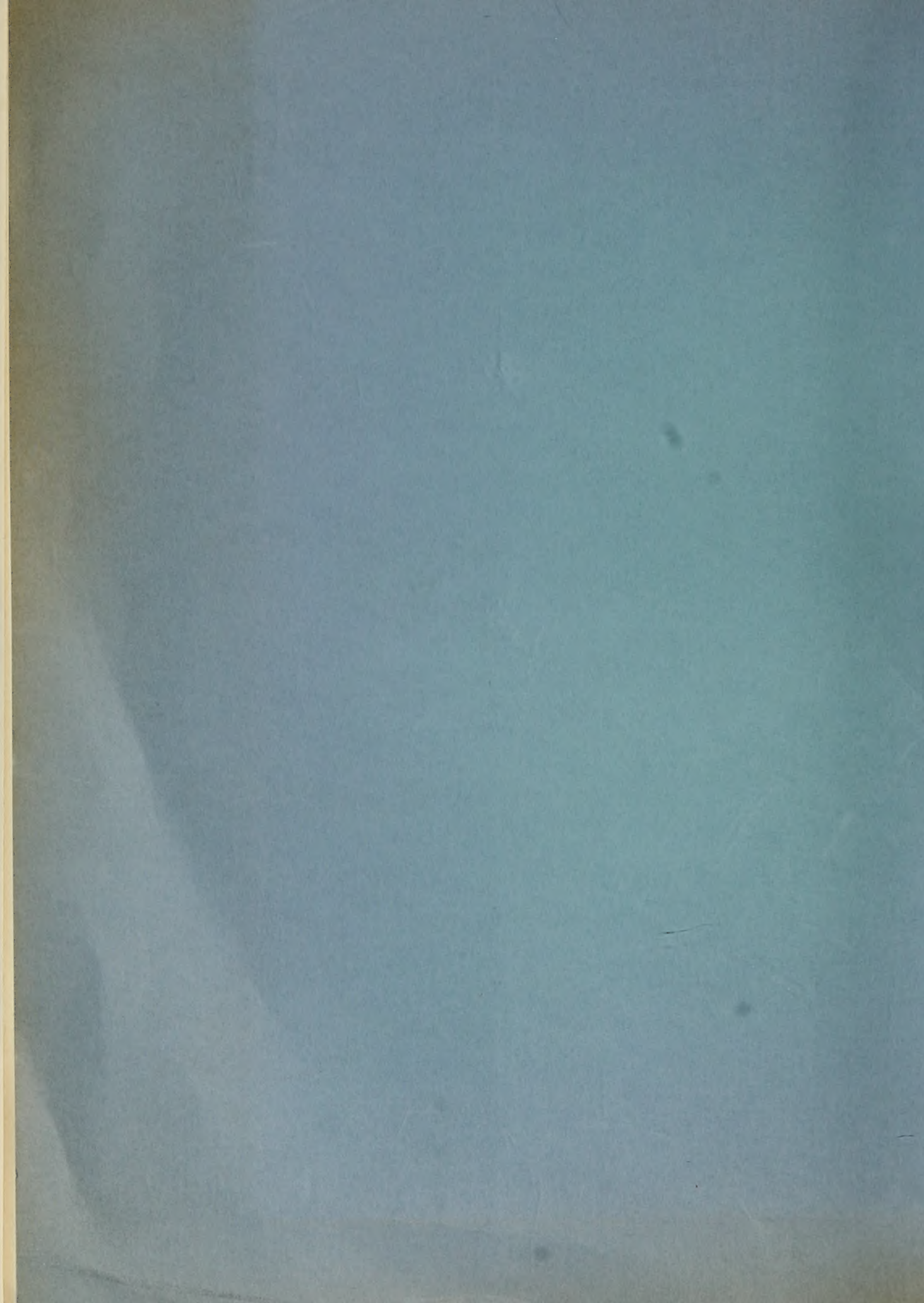
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**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**BLADE-TRIBUNE PUBLISHING COMPANY, RESPONDENT
SAN DIEGO TYPOGRAPHIC UNION, LOCAL 221, INTER-
NATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
INTERVENOR**

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

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Associate General Counsel,

MARCEL MALLET-PREVOST,
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FILED

SEP 18 1967

WM. B. LUCK, CLERK

SEP 20 1967

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21,860

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BLADE-TRIBUNE PUBLISHING COMPANY, RESPONDENT
SAN DIEGO TYPOGRAPHIC UNION, LOCAL 221, INTER-
NATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
INTERVENOR

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court on petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),¹ for enforcement of its order (R. 32-33, 80)²

¹ The pertinent statutory provisions are reprinted in Appendix B., *infra*, pp. 41-43.

² References designated "R." are to Volume I of the Record as reproduced pursuant to Rule 10 of this Court. Refer-

against Blade-Tribune Publishing Company, issued December 6, 1966, and reported at 161 NLRB No. 137. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Ocean-side, California, where the Company is engaged in the publication of a daily newspaper. No jurisdictional questions are presented.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by interrogating its employees about their union activities, by promising wage increases to discourage union activities, and by changing the working hours of employee Agneta in order to discourage his union activities and those of the other employees. The Board also found that the Union³ represented a majority of the Company's employees in an appropriate unit when it demanded bargaining, and that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union in order to gain time in which to undermine the Union's majority status. The facts are these:

ences designated "Tr." are to the reporter's transcript of the testimony as reproduced in Volume II of the Record. References designated "GC Exh.," or "R Exh." are to exhibits of the General Counsel and Respondent respectively.

³ San Diego Typographical Union, Local 221, International Typographical Union, AFL-CIO.

A. The organizing campaign

The Company, which publishes a daily newspaper in Oceanside, California, employs 22 full-time employees, excluding Foreman Wells, in its mechanical department (R. 20; G.C. Exh. 8). The Union began organizing these employees in July 1963 (R. 21; Tr. 87-88, 93-96). At that time it received an application for membership from Jocheim (G.C. Exh. 17), and in February 1964 it received applications from Bowman (G.C. Exh. 14) and Metzger (G.C. Exh. 16). Then, in March 1964, it ceased its organizing activity and filed unfair labor practice charges against the Company alleging violations of Section 8 (a)(1) and (3) of the Act (Board Case No. 21-CA-5854). In June 1964, a settlement agreement was executed pursuant to which the Company posted the usual notices, although by the terms of the agreement, it did not admit violating the Act (R. 23-24; Tr. 243-244). Thereafter, the Union resumed its organizing campaign and obtained applications from seven more employees.⁴ Four other employees⁵ were already dues-paying members of the Union (R. 21; Tr. 87-88, 93-96). The Union thus represented 13 of the 22 employees in the unit and on January 15,

⁴ In October 1964 Agneta signed an application (G.C. Exh. 15) and in January 1965 Harrington (G.C. Exh. 9), Kopp (G.C. Exh. 10), David Wanner (G.C. Exh. 11), and Eugenia (Smith) Wanner (G.C. Exh. 12) signed applications. Another employee, Bleau, also signed an application. However, because he was a casual employee he was not included in the unit (R. 20).

⁵ Moses, Craig, Thompson, and Casebolt.

1965, it demanded recognition as their bargaining agent (R. 13-14; Tr. 228).⁶

B. The Company refuses to recognize the Union

Company President Thomas Braden was out of town when the Union's telegram arrived. Immediately upon his return, however, he called a meeting of some of the mechanical department employees. He read the Union's telegram to them and told them he was opposed to the Union. Among other things, he told them that, "he hated to see [the Union] come into the shop," (R. 14; Tr. 43), and that he felt that [the Company] was a family, and everybody was happy . . . and that we didn't need a union in the shop" (R. 14; Tr. 154), that "he felt the Blade-Tribune would be better off without the Union" (R. 14; Tr. 190-191), that "he could run the shop better the way he had been running it for years with the close-knit family of people, and that everybody would progress along with the paper, which is progressive" (Tr. 154), and that "it's up to you people, but I am against it. At this time I can't afford it" (R. 14; Tr. 269). Then, after consulting with his attorney (Tr. 324-325), Braden wrote the Union on January 20 refusing recognition, assertedly because he doubted that it repre-

⁶ In its telegram requesting recognition, the Union described the unit as covering: "all mechanical operations from the receipt of the copy by the composing room employees to the finished product that comes off the printing press. All journeymen and apprentice employees performing composing room, press and stereotype operations are included in the collective-bargaining group . . ." (R. 14; Tr. 11-12).

sented a majority in an appropriate unit. In his letter Braden suggested that the Union seek a Board-conducted election (R. 14-15; Tr. 12; G.C. Exh. 2).

C. The Company's unlawful activities

During the 10 days following his rejection of the Union's bargaining request, Braden systematically interrogated 13 of the mechanical department employees about their union sympathies (R. 15; Tr. 32, 34, 325). Each of these employees was summoned individually to Braden's office. Braden first told the employee he did not have to answer the questions and that no reprisals would be taken because of his answer, then asked each one whether he wanted to be represented by the Union (R. 15; Tr. 325-326). In addition, he engaged several employees in more extensive discussions regarding the Union and their reasons for joining. Thus, employee Bowman told Braden that he wanted a raise, to which Braden replied, "I can't give you a raise because of the Union. I will see what I can do" (R. 15; Tr. 44). Two weeks later, Bowman received an increase of 20 cents an hour (R. 15; Tr. 45).⁷ When Braden asked employee Harrington whether he signed a card, Harrington told him he had not, although Harrington had in fact signed an application for membership on January 14 (R. 15; Tr. 57; G.C. Exh. 9). Braden then volunteered that "he didn't particularly think the

⁷ Braden testified that Bowman's raise conformed to a company policy of semi-annual pay raises (Tr. 334). However, Bowman testified that in the past he received only 10-cent pay raises (Tr. 47-48).

Blade-Tribune needed the Union at the time, but maybe within five or ten years it might need it" (Tr. 58). Braden also reminded Harrington that it was almost time for a raise and when Harrington replied that he "heard that since the Union is trying to get in we won't be getting any raises until it is settled" (R. 15; Tr. 64-5), Braden rejoined, "That's the idea" (R. 15; Tr. 64-5). Nonetheless, Harrington received a 15-cents an hour raise shortly before the election (R. 15; Tr. 58). Braden asked employee Verle Messinger how he felt about the Union and repeated his assertion that his plant ought to be run the way he saw fit. Messinger told Braden that he had not yet made up his mind (R. 15; Tr. 125-127).

Employee Agneta was asked whether he was happy working at the Blade-Tribune, whether he was concerned about wages, and whether he had signed anything for the Union. To the latter question, Agneta replied in the negative even though he too had signed an application for membership. After determining that Agneta was not concerned about wages (Tr. 156), Braden asked him "What was the purpose, what was the need." Agneta replied that he was concerned about job security since he had twice been fired from the Blade-Tribune (R. 15), once for asking for a raise (Tr. 160) and a second time because the Company was replacing him with a friend of Braden's (Tr. 161). Agneta's conversation with Braden lasted about an hour (Tr. 158) and from its course, Braden correctly assumed that Agneta had joined the Union (Tr. 331, 188). When employee David Wanner was interrogated, he told Braden that

he was in favor of the Union (Tr. 192) and also that he had signed because he was planning to go to Alaska where he understood that all the printing shops were unionized. Braden responded by asking Wanner “why would [he] kick him [Braden] in the teeth . . . just before [he] left” (R. 16; Tr. 192). In the case of Eugenia Wanner, Braden first lectured her on the pros and cons of organization and then asked if she had signed anything for the Union. Although she had already signed an application (G.C. Exh. 12), she responded, “I didn’t—I was innocent” (R. 16; Tr. 210).⁸

Following Braden’s interrogations of the employees, the Union and the Company exchanged another series of letters. On February 4, 1965, the Union again requested bargaining and offered to submit to a card check (R. 16; G.C. Exh. 3). On February 11, Company counsel sent a letter to the Union’s counsel, stating that the Company “genuinely doubts” the Union’s majority status and that the unit of all mechanical employees was inappropriate, and suggested that the Union seek a Board-conducted representation election (R. 16-17; G.C. Exh. 4). In early March the Union again offered to submit to a card check among the employees in “the traditional composing room unit” (R. 17; G.C. Exh. 5). The Company answered on March 15, again stating that it doubted the Union’s majority and the validity of its authorization

⁸ Other employees who testified to being interviewed by Braden were Richard Hareld (Tr. 217), Aialaisa Salani (Tr. 269), and Keith Neal (Tr. 261).

cards, and suggesting that an election be held (R. 17-18; G.C. Exh. 6).

About a week later, the Company filed an election petition in which it described the unit as "All production and maintenance employees employed in the composing room department. . . ." In early April the Union and the Company entered into an Agreement for a Consent Election. The unit described in the Agreement was the same as that originally suggested by the Union (R. 18; Tr. 17) :

All employees employed in the composing room department and the press stereotype department including craft foremen; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

During the time between entering into this agreement and the election, Braden continued his campaign against the Union by taking most of the mechanical department employees to lunch. During these luncheons, Braden questioned the employees about their feelings toward the Union (R. 18; Tr. 194, 219-220, 271-272). With some he also discussed their personal and financial problems (R. 18; Tr. 36, 37, 46). With Bowman, Braden again discussed a pay raise (R. 18; Tr. 49), and during his luncheon with David Wanner and Metzger, Braden told them that in the near future he thought it would be possible to establish a pension plan equal to the Union's (R. 18; Tr. 194-195).

Shortly before the election, the Company posted a new work schedule which changed Agneta's hours so

as to require him to “double back”—that is, to work the 3:00 p.m. to 11:00 p.m. shift on Thursdays and then to return to his regular 7:00 a.m. to 3:00 p.m. shift on Friday mornings, after 8 hours off (R. 18-19; Tr. 165-166). Agneta was the only employee required to “double back” under the new schedule and in the past no employee had been required to work such hours (R. 19; Tr. 166, 143).⁹

Prior to posting the new work schedule, Foreman Wells told employee Verle Messinger that “as soon as the election was over with . . . he was going to get rid of Agneta” (R. 19; Tr. 129-130). He also showed Messinger the new work schedule and told him that, “he was sure Agneta wouldn’t stay there after he saw the schedule” (Tr. 129-130; R. 19). Meanwhile, Agneta heard about the work schedule from other employees and spoke to Wells about it (R. 19; Tr. 167). Wells told him that if he did not want to work the new schedule, he would be replaced (R. 19; Tr. 167). Wells also refused to let Agneta see President Braden about the schedule, telling him that Braden had already approved it (R. 19; Tr. 167). Agneta tried to work the new schedule, but found that the doubling back made him drowsy and increased the inherent dangers of his job—cutting cast metal with a power saw (R. 19; Tr. 165, 172). Then, assuming, as Wells had told him, that he would be replaced if he did not work the new schedule, Agneta stopped reporting for work (R. 19; Tr. 172).

⁹ Agneta was one of the few employees not taken to lunch by Braden (Tr. 177).

D. The election

The election was held on May 5, and resulted in a vote of 15 against the Union, 8 in favor of the Union, and 4 challenged ballots.¹⁰ Thereafter, the Union filed timely objections to conduct affecting the results of the election. The Regional Director sustained one of the objections and set the election aside. The Union then filed the 8(a)(1) and (5) charges giving rise to this proceeding (R. 18).

II. The Board's Conclusion and Order

On the above facts, the Board found that the Company violated Section 8(a)(1) of the Act by Braden's interrogation of the employees to determine their union sympathies (R. 18, 19), by his promising of pay increases (R. 18, 19), and by the adverse change in Agneta's hours of employment (R. 20). The Board further found that the Union represented a majority of the Company's employees in an appropriate unit (R. 15) and that the unfair labor practices, beginning as they did immediately after receipt of the Union's bargaining demand, demonstrated that the Company's refusal to bargain was in bad faith, in violation of Section 8(a)(5) of the Act (R. 20-21).

The Board's order requires the Company to cease and desist from the unfair labor practices found, and from interfering with, restraining, or coercing its

¹⁰ The challenges were not sufficient in number to affect the results of the election and therefore were not resolved by the Regional Director.

employees in any like or related manner in the exercise of their Section 7 rights. Affirmatively, the Board ordered the Company to bargain with the Union and to post the appropriate notices (R. 21-22).

ARGUMENT

I. Substantial Evidence on the Record as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(1) of the Act by Interrogating Employees About Their Union Sympathies and by Unfavorably Changing the Working Hours of Employee Agneta

A. The interrogations in Braden's office

As detailed in the Statement, *supra*, pp. 4-5, Braden first refused the Union's demand for recognition and then interrogated 13 of the employees to determine their union sympathies. The Board found that the interviews violated Section 8(a)(1) of the Act because of the circumstances under which they were conducted. Thus, in determining whether a poll of employees is violative of the Act, the Board must balance the employer's interest in determining whether a union demanding recognition does, in fact, represent a majority of his employees against the statutory right of employees to be free from employer interference, restraint, and coercion in the conduct of their union activities. For when an employer inquires into such activity, the employees interrogated naturally fear that he not only wants the information for legitimate purposes, but also contemplates some form of reprisal once the information is obtained. Or, as this Court has held, "Interrogation as to union sympathy and affiliation has been held to violate the Act because of

its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902, 904. And, "Whether the Company would be disposed to make such use of the [information] is beside the point. As long as the opportunity is present, employees may have a real fear that this would be done." *N.L.R.B. v. Essex Wire Corp. of Calif.*, 245 F. 2d 589, 592 (C.A. 9). In balancing these conflicting interests the Board and the courts have held that the legality of an employer poll depends upon the manner in which the poll is conducted and the circumstances surrounding the taking of the poll.¹¹

Thus, in deciding in each case whether a poll to determine union affiliation is lawful or whether it interferes with the employees in the exercise of guaranteed rights, certain factors are relevant. (See *Blue*

¹¹ *Blue Flash Express Co.*, 109 NLRB 591; *N.L.R.B. v. California Compress Co.*, 274 F. 2d 104, 106 (C.A. 9); *Daniel Construction Co. v. N.L.R.B.*, 341 F. 2d 805, 812-813 (C.A. 4), cert. denied, 382 U.S. 831; *N.L.R.B. v. Lexington Chair Co.*, 361 F. 2d 283, 289-290 (C.A. 4); *N.L.R.B. v. McCormick Concrete Co.*, 371 F. 2d 149, 151 (C.A. 4); *N.L.R.B. v. Syracuse Color Press*, 209 F. 2d 596, 599-600 (C.A. 2); *N.L.R.B. v. Camco, Inc.*, 340 F. 2d 803, 805-806 (C.A. 5), cert. denied, 382 U.S. 926; *Bourne v. N.L.R.B.*, 332 F. 2d 47, 48 (C.A. 2); *International Union of Operating Engineers, Local 49 v. N.L.R.B.*, 353 F. 2d 852 (C.A. D.C.). See also Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 106-112, November 1961; Seng, *Employer May Violate Section 8(a)(1) in Attempting to Ascertain Union Majority Status*, 41 Notre Dame L. Rev. No. 4 (April 1966).

Flash Express Co., supra) : 1) whether the poll serves a legitimate purpose; 2) whether that purpose is conveyed to the employees; 3) whether the employees are given assurances that reprisals will not be taken against them because of their answers; 4) whether the atmosphere in which the poll is taken is free from employer animosity toward the Union.¹² As we show below, substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by polling its employees, although Braden advised the employees that they need not answer.

As noted, Braden first refused the Union's demand for recognition and then, over a period covering the next 10 days, polled his employees to determine their union sympathies. Having already acted upon his alleged doubt of the majority, Braden could have had no legitimate purpose for his conduct. Though the Company alleges that the poll was taken to "confirm" Braden's doubt (R. 28; Tr. 325), confirmation of doubt already acted upon can hardly justify resort to a method of confirmation so likely to interfere with the employees' rights.¹³ Nor did the Board here rely

¹² Subsequent to its decision in this case, the Board added the requirement that the poll be conducted by a secret ballot in order to minimize its coercive effect on the employees. *Strucknes Construction Co.*, 165 NLRB No. 102, 65 LRRM 1385, 1386.

¹³ See, e.g., *P & M Parking System*, 139 NLRB 987, 988; *Henry I. Siegel Co., Inc.*, 143 NLRB 386, 387, fn. 1; *General Electric Co.*, 143 NLRB 926, 929, 931. In all of these cases, polls were found unlawful where they were conducted subse-

solely on the timing of the poll in finding it unlawful. The evidence demonstrates that Braden, after announcing that no reprisals would be taken, actually used the poll as a vehicle for interfering with the employees' free choice. With at least three employees, he attempted to uncover the sources of their dissatisfactions and to correct them. He asked employees Harrington and Bowman whether their wages were satisfactory, and when they responded in the negative, he in effect promised them increases.¹⁴ Then, when

quent to the refusal of the Union's bargaining demand. Before the Board, the Company argued that *Cameo Lingerie, Inc.*, 148 NLRB 535, stands for the proposition that the timing of the poll does not control its legality. As the Company noted, the poll in *Cameo*, *supra*, was conducted three months after the Union's demand. However, in *Cameo* the employer was at all times ready to bargain with the union if a card check demonstrated that it represented an uncoerced majority. During the three months, the union and the employer were unable to agree upon a satisfactory method of conducting a card check and the union would not agree to a consent election. It was therefore necessary for the employer to conduct his own poll to determine how to respond to the bargaining demand.

¹⁴ Subsequent to the poll but prior to the election, Braden granted the raises. Though the Company claims that the raises were granted in accord with its policy of giving raises twice a year, it offered no independent evidence, such as payroll records, in support of this assertion. But, even if there were such a policy, Bowman's testimony (Tr. 47-48) that the raise he received as a result of his interview with Braden was twice as large as any he had received in the past, indicates that Braden had an unlawful reason for granting the raise when he did. As the Seventh Circuit said, "[I]nterference is no less interference because it is accomplished through allurements rather than coercion. . . ." *Western Cartridge Co. v. N.L.R.B.*, 134 F. 2d 240, 244.

Agneta responded that he was “happy” with his wages, Braden drew him into an hour-long conversation about his other grievances (Tr. 158, 188). As noted below, p. 17, Agneta was the only employee who admitted joining the Union to secure redress of his grievances and as a result of his disclosures during the poll, he was subjected to a discriminatory change in hours.

The poll was also conducted in a manner designed to heighten the coercive impact.¹⁵ The employees were each summoned to come alone to President Braden’s office, creating an atmosphere of “unnatural formality” (*N.L.R.B. v. M & B Headwear Co.*, 349 F. 2d 170, 172 (C.A. 4)), in sharp contrast with Braden’s usual relations with his employees (R. 28; Tr. 343-346). In some instances, before asking how the employee felt, Braden delivered a lecture on unionism, observed that he “figured his plant should be run the way he saw fit to run it” or remarked that joining a union evidenced disloyalty to the “family” relationship in the plant (Tr. 126, 154).

In addition to these various circumstances, the refusals of three employees to admit that they had signed a card—for example, Eugenia Wanner’s reply “I didn’t—I [am] innocent” (Tr. 210)—further supports the Board’s inference that they were “answering under pressure” (*N.L.R.B. v. Camco, Inc.*, 340 F. 2d 803, 806 (C.A. 5), cert. denied, 362 U.S. 926). Accord: *Bourne v. N.L.R.B.*, 332 F. 2d 47, 48 (C.A. 2); *N.L.R.B. v. Firedoor Corp. of America*, 291 F. 2d

¹⁵ As noted above, the Board now requires a secret ballot for such a poll.

328, 331 (C.A. 2). Clearly, then, the poll was conducted neither for a legitimate purpose nor in an acceptable manner and, as found, “although Braden sought to make the interviews appear innocuous by following the formula set forth in *Blue Flash*, they were nevertheless coercive in character and reasonably had a tendency to coerce the employees” (R. 29).

B. Interference, restraint and coercion during the luncheon campaign

As set forth in the Statement, *supra*, p. 8, Braden’s election campaign consisted of taking most of the employees to lunch. During these luncheons, Braden admittedly asked the employees “what they thought of the Union, or whether they thought we ought to have a union” (R. 18; Tr. 351. See also Tr. 194). He also used the occasion to discuss a pay raise with Bowman (R. 18; Tr. 49), and to tell Wanner and Metzger that he thought he would establish a pension plan in the near future which would be “as good as they [the Union] has got” (R. 18; Tr. 194-195). Clearly, questioning the employees about their union sympathies at this point in the campaign violated Section 8(a)(1). See, e.g., *N.L.R.B. v. Victory Plating*, 325 F. 2d 92, 93 (C.A. 9); *Bon Hennings Logging Co. v. N.L.R.B.*, 308 F. 2d 548, 552 (C.A. 9); *N.L.R.B. v. U.S. Divers Co.*, 308 F. 2d 899, 905 (C.A. 9). Just as clearly, the promise of a pension plan and the indication to Bowman that he could receive another pay raise were violative of the Act. See, e.g., *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409-410.

C. The discriminatory change in Agneta's hours of employment

As noted above, Agneta was the only employee who, during the interrogations by Braden, admitted joining the Union because of his grievances against the Company.¹⁶ Agneta was also one of the few full time employees whom Braden did not bother taking to lunch before the election (Tr. 177). Then, shortly before the election when Wells prepared the new work schedule, he told Messinger that "as soon as the election was over with . . . he was going to get rid of Agneta" (R. 19; Tr. 129-130). At the same time he showed the new schedule to Messinger and commented that, "he was sure Agneta wouldn't stay there after he saw the schedule" (R. 19; Tr. 129-130). The reason for Wells' prediction was that the new schedule required Agneta to "double back" one day each week—to work the 3:00 p.m. to 11:00 p.m. shift on Thursday night and then to return to work Friday morning for the 7:00 a.m. to 3:00 p.m. shift after only eight hours off. The schedule was particularly difficult for Agneta because the lack of sufficient rest between shifts made him drowsy and increased the dangers of cutting metal with a power saw (R. 19; Tr. 172). Of course, unlike the mere change in the schedule itself, Wells' comments to Messinger in the midst of the organizing campaign were "likely to be rapidly dissemi-

¹⁶ The two other employees who admitted signing applications, Metzger (Tr. 331) and Wanner (Tr. 192), told Braden they had done so only because they intended to leave town in the near future and wanted to be union members so they could get jobs in union printing shops (Tr. 331-332).

nated" (*Irving Air Chute Co. v. N.L.R.B.*, 350 F. 2d 176, 179 (C.A. 2)), and in fact they were. Before Agneta knew of the change, Messinger told him he had better look for another job (Tr. 174), and after the other employees knew of it, Messinger asked if Agneta "would be able to stay there long enough to vote in the election" (Tr. 175). Employee Caseholt told Agneta it was "obvious" that the Company was trying to get him to quit before the election, while other employees said they hoped they were not next (Tr. 175, 177).

Under the circumstances, the statements of Wells constituted, not only threats in themselves, but an "outright confession" of unlawful conduct with respect to the change itself.¹⁷ Nevertheless, the Company representatives asserted before the Board that they changed his shift because they needed Agneta's work at that time and wanted him to work with Jones, a more experienced compositor (R. 30; Tr. 168). Agneta credibly testified, however, that he prepared copy which was not used until two days afterward (Tr. 175, 176) and admittedly no other employee had worked such a schedule (R. 19; Tr. 143, 166). Since Jones did not "double back" and was scheduled for different days off, Jones and Agneta worked together only three days a week following the change (G.C. Exh. 20), and Jones himself regarded the shift as undesirable and not particularly helpful in training an apprentice (R. 30; Tr. 308-9). Thus,

¹⁷ *N.L.R.B. v. Globe Products Corp.*, 322 F. 2d 694, 696 (C.A. 4); *N.L.R.B. v. Ferguson*, 257 F. 2d 88, 92 (C.A. 5).

the failure of the Company's asserted reasons for the change to withstand scrutiny is a further indication of its unlawful motive. See, e.g., *N.L.R.B. v. Dant & Russell*, 207 F. 2d 165, 167 (C.A. 9); *N.L.R.B. v. Griggs Equipment, Inc.*, 307 F. 2d 275, 278 (C.A. 5).

The Company also contended that the treatment of Agneta was not made the subject of a timely charge, and consequently was barred from consideration by Section 10(b) of the Act.¹⁸ The unfair labor practices occurred in April and May 1965. It is undisputed that the Union filed an unfair labor practice charge in June 1965 which alleged that the Company, in violation of Section 8(a)(1) of the Act, "has interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act so as to destroy the pre-election majority status of the . . . [Union prior to] May 5, 1965" (R. 3). The complaint issued on that charge alleged the specific instances of interference by Braden and Wells during this period which we discussed, *supra*, pp. 11-16. The charge also alleged that the change in Agneta's hours violated Section 8(a)(3) and (1), but the General Counsel was unable to locate employee Messinger, whose testimony (see *supra*, p. 17) ultimately established the violation with respect to Agneta. Accordingly, the General Counsel approved the withdrawal of that portion of the charge before issuing the complaint (*infra*, p. 20). On the evening before the

¹⁸ In relevant part, Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . . ."

hearing, however, Messinger was located and he was called as a witness (Tr. 135). The Trial Examiner granted the General Counsel's motion to amend the complaint to include the change in Agneta's hours as a violation of Section 8(a)(1).

Of course, this is not a case in which the charge required by Section 10(b) was timely filed and then dismissed entirely.¹⁹ Rather, the complaint was issued on a timely charge, and the question is whether the amendment to the complaint was proper. Moreover, this Court has recognized that where specific actions are alleged for the first time by way of amendment to a complaint, Section 10(b) "has been uniformly interpreted to authorize inclusion within the complaint of amended charges—filed after the six months' limitation period—which 'relate back' or 'define more precisely' the charges enumerated within the original and timely charge." *N.L.R.B. v. R. H. Osbrink Mfg. Co.*, 218 F. 2d 341, 345 (C.A. 9).²⁰ For the rule incorporated in Section 10(b) is "the result of reasoning generally that the charge could relate back because the employer would not be preju-

¹⁹ Cf. *N.L.R.B. v. Silver Bakery, Inc.*, 351 F. 2d 37 (C.A. 1); *N.L.R.B. v. Electric Furnace Co.*, 327 F. 2d 373 (C.A. 6).

²⁰ Accord: *N.L.R.B. v. Burns Det. Agency, Inc.*, 346 F. 2d 897, 899 (C.A. 8); *Texas Industries, Inc. v. N.L.R.B.*, 336 F. 2d 128, 132-133 (C.A. 5); *N.L.R.B. v. Kiekhoefer Corp.*, 292 F. 2d 130, 135 (C.A. 7); *N.L.R.B. v. Palette Stone Corp.*, 283 F. 2d 641, 642 (C.A. 2); *N.L.R.B. v. Raymond Pearson, Inc.*, 243 F. 2d 456, 459 (C.A. 5); *N.L.R.B. v. Local 169, Teamsters*, 228 F. 2d 425, 427-428 (C.A. 3); *N.L.R.B. v. Gaynor News Co.*, 197 F. 2d 719, 721 (C.A. 2); *Cusano v. N.L.R.B.*, 190 F. 2d 898, 903 (C.A. 3).

diced since he would 'retain pertinent records, interrogate witnesses and, in a general way, prepare his defense' to the unfair labor practices complained of in the charge" (*R. H. Osbrink Mfg. Co.*, *supra*, 218 F. 2d at 346 (C.A. 9) quoting *Cusano*, *supra*, 190 F. 2d at 903).

The amendment has merely added an additional allegation of unlawful 8(a)(1) conduct which occurred at the same time, involved the same supervisors, and had the same objective. It was thus an allegation of an unfair labor practice which was a continuation of and "in pursuance of the same objects" as the unfair labor practices already alleged. *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 369. Thus, if no reference to Agneta had been made in the initial charge, it is clear that the amendment would have been proper. Moreover, to hold that the complaint may not be enlarged to include related matters *merely* because they were previously withdrawn from the charge, would prejudice a party making a specific charge. The charge could have been couched in the general language of the statute, however; it need not have been precise. *N.L.R.B. v. Fant Milling Co.*, 360 U.S. 301. Had it been so framed, and the evidence of the particular and related violation not specifically mentioned in the complaint, it could unquestionably have been added at the hearing. Accordingly, the issue here is whether the procedure actually misled the Company in preparing its defense. As we show below, it did not.

Although the Company opposed the General Counsel's motion on the ground that the amendment was

time-barred, it did not contend that it was surprised or unable to defend itself against the charge, or even that it needed a continuance to prepare a defense. Indeed, the contrary affirmatively appears. Thus, the relevant document was introduced (G.C. Exh. 20), the Company cross-examined the General Counsel's witnesses, specifically questioning them about their testimony relevant to the incident not mentioned in the original complaint (Tr. 142-143, 144-145, 151, 183-184),²¹ presented testimony about the incidents through its own witnesses (Tr. 312-317, 347-348), and presented relevant legal argument in its exceptions and briefs to the Trial Examiner and Board. Clearly, therefore, the matters were fully litigated and the Company was not prejudiced by the absence of specificity as to this particular matter in the complaint or because it was originally withdrawn from the charge. Thus, as the Eighth Circuit recently stated in a related context, the existence of this violation was "a material issue which has been fairly tried by the parties [and] should be decided by the Board. . . ." *American Boiler Manufacturers Ass'n v. N.L.R.B.*, 366 F. 2d 815, 821, and cases there cited.²²

²¹ Clearly demonstrating its knowledge of the circumstances surrounding the charge is the fact that the Company tried to force Agneta to admit that his opposition to the change was based on the fact that it interfered with a part-time job (Tr. 184-185).

²² Accord: *The Frito Co., Western Div. v. N.L.R.B.*, 330 F. 2d 458 (C.A. 9); *N.L.R.B. v. Mackay Radio & Tel. Co.*, 304

II. Substantial Evidence on the Record as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(5) and (1) of the Act by Refusing to Recognize and Bargain With the Union

Section 8(a)(5) of the Act requires an employer "to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a)." Section 9(a) provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." Although Section 9(c)(1) provides the machinery by which the selection of a representative may be determined in a Board-conducted election, it has long been settled that an election is not the only means by which representative status may be established. See *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72, and cases cited at n. 8 therein. It is equally well settled that where authorization cards have been signed by a majority of the unit employees, the employer violates Section 8(a)(5) of the Act if he refuses to recognize and bargain with the union unless such refusal is based upon a good faith doubt

U.S. 333, 349-350; *American Newspaper Publishers Ass'n. v. N.L.R.B.*, 193 F. 2d 782, 789-800 (C.A. 7), cert. denied, 344 U.S. 812; *N.L.R.B. v. Puerto Rico Rayon Mills, Inc.*, 293 F. 2d 941 (C.A. 1); *Curtiss-Wright Corp. v. N.L.R.B.*, 347 F. 2d 61, 72-74 (C.A. 3); *N.L.R.B. v. Wm. J. Burns Det. Agency*, 346 F. 2d 897, 900-901 (C.A. 8); *N.L.R.B. v. Kiekhaefer Corp.*, 292 F. 2d 130, 135 (C.A. 7); *N.L.R.B. v. Roure-Dupont Mfg. Co.*, 199 F. 2d 631 (C.A. 2).

of the Union's majority status.²³ As the Company apparently concedes, the election did not allow the employees to exercise their free choice, and accordingly the Board looked to the Union's pre-election majority in determining to issue a bargaining order. The Company resists such an order by contending that the Union did not represent a majority of the employees, even at the time of the demand, and that if it did, the Company had a good faith doubt with respect to the Union's status. As we show below, these contentions are without merit.

A. The Union's majority status

In April 1965, the Company and the Union stipulated that employees in the Company's "composing room department and press-stereotype department" (R. 26; Tr. 17) constituted an appropriate unit for bargaining. Of course, this is merely a restatement, in terms of the Company's organization, of the Union's original demand for recognition in January 15, 1965, which was couched in terms of function—that is, all employees engaged in "mechanical operations from the receipt of copy by the composing room em-

²³ *N.L.R.B. v. Security Plating Co., Inc.*, 356 F. 2d 725, 727 (C.A. 9); *N.L.R.B. v. Hyde*, 339 F. 2d 568, 570 (C.A. 9); *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F. 2d 902, 908-909 (C.A. 9); cert. denied, 379 U.S. 961, rehearing denied, 380 U.S. 926; *Colson Corp. v. N.L.R.B.*, 347 F. 2d 128 (C.A. 8), cert. denied, 382 U.S. 904; *N.L.R.B. v. Economy Food Center, Inc.*, 333 F. 2d 468, 471-472 (C.A. 7); *Florence Printing Co. v. N.L.R.B.*, 333 F. 2d 289, 291-292 (C.A. 4); *Irving Air Chute Co. v. N.L.R.B.*, 350 F. 2d 176, 182 (C.A. 2).

ployees to the finished product which comes off the press" (G.C. Exh. 22).

As of the time of the demand, that unit included 22 employees, and the Board found that four of these employees were dues-paying members of the Union and nine others had signed applications for membership. Since, as the Company apparently concedes, an "application for union membership implies authority to bargain (*Lebanon Steel Foundry v. N.L.R.B.*, 130 F. 2d 404, 407 (C.A. D.C.), cert. denied, 317 U.S. 659), the Union thus was shown to have the support of a clear majority, and the burden is on the Company to show by "clear and convincing evidence" that this *prima facie* showing of majority status should be rejected. *N.L.R.B. v. Security Plating Co.*, 356 F. 2d 725, 726-727 (C.A. 9); *Amalgamated Clothing Workers (Hamburg Shirt) v. N.L.R.B.*, 371 F. 2d 740, 745 (C.A. D.C.). The Company has not met its burden.

The Company alleges, in effect, that five of the applications were invalid because they were signed too long before the demand. Though the Board's rule is that bargaining authorizations generally will not be counted if more than a year old (*Luckenbach Steamship Co., Inc.*, 12 NLRB 1333; *Surpass Leather Co.*, 21 NLRB 1258), it has also established an exception where the application was signed during the same organizing campaign as that leading to the request to bargain. Thus, where the campaign was interrupted by the filing and processing of unfair labor practice charges, the authorizations will be counted even though more than a year old. *Knickerbocker Plastics*

Co., 104 NLRB 514, enforced 218 F. 2d 917, 921 n. 4 (C.A. 9); *Safeway Stores, Inc.*, 99 NLRB 48, 56. See also, *The Grand Union Co.*, 122 NLRB 589, 590 n. 1. Such a rule is necessary in order to prevent employers from benefitting from their unfair labor practices. Without the exception, employers would find it to their advantage to violate the Act during a campaign and force the union into the difficult position of choosing between filing charges and beginning a new campaign or of continuing to organize in the face of the unlawful activity.

In the instant case, two of the cards which the Company claims were stale were in fact executed within a year of the January 15, 1965 bargaining demand and were properly counted.²⁴ But in any event, these cards, as well as the others, were properly counted under the exception discussed above since the time lapse between signing and the bargaining demand was due to the Company's unfair labor practices.

The Union's campaign began in 1963. Jocheim signed his application on July 31, 1963. In February 1964, Bowman and Metzger signed their applications. The next month, March 1964, the Union filed unfair labor practice charges against the Company.²⁵ These resulted in the execution of a formal settlement agreement pursuant to which the Company posted the usual notices (R. 23). The settlement agreement was

²⁴ Michael Bowman (G.C. Exh. 14, executed February 12, 1964) and Richard Metzger (C.A. Exh. 16, executed February 11, 1964).

²⁵ Board Case No. 21-CA-5854.

approved by the Regional Director in June 1964, and the Union then resumed its organizing activity. In October 1964 an application was obtained from Agneta (G.C. Exh. 15), and on January 14, 1965, applications were submitted by Harrington, Kopp, David Wanner, and Eugenia (Smith) Wanner (G.C. Exhs. 9-12). The next day the Union made its bargaining demand (Tr. 11-12).

The facts demonstrate, then, that the union campaign was interrupted by the filing of charges against the Company and that it was resumed after the settlement agreement was reached.²⁶ The Board also noted that two of the employees in question continually demonstrated support of the Union. Thus, after

²⁶ Before the Board, the Company argued that the campaign was interrupted, not by the unfair labor practice proceedings, but by the illness of Carl Mason, who was president of the Union, and that there were, therefore, two separate campaigns and the cards should not be counted. The facts, however, do not support such a contention. The dates on the applications indicate that the last cards signed prior to the break in the campaign were executed in February 1964 (G.C. Exh. 14 and 16), one month before the filing of the charge with the Board. Mason did not become ill until July 1964 (Tr. 79). After the settlement agreement was approved, the first application obtained was executed by Agneta on October 1, 1964. Though this was two months after the approval of the settlement agreement it was nonetheless almost one month before Mason returned to work following his illness and three months before he himself again began organizing at the Blade-Tribune (Tr. 79). Thus, since the campaign stopped long before Mason became ill and was resumed before he returned to work, it is apparent that his illness did not control the timing of the campaign. At most, it caused a slowdown in the organizing effort between the settlement agreement and the demand.

the demand, Jocheim took the Union's oath (Bd. Dec. 2; Tr. 90). Also, the day before the demand, Bowman took employees Kopp and Harrington to a union meeting where they both signed applications (Tr. 225, 284), and, while testifying, he did not repudiate his application.²⁷ Though Metzger did not testify, the Board, in the absence of contrary evidence, was justified in assuming that his application, executed within a year of the demand, was still viable. *N.L.R.B. v. Greenfield Components Corp.*, 317 F. 2d 85, 89 (C.A. 1).

Neal's application was executed in April 1963, and he was then admitted to membership and paid the required fees (Tr. 97-98, 263), although he did not take the Union's oath (Tr. 263). Neal submitted his application in the expectation of working at a printing company in San Diego, California (Tr. 262), but in May 1964 Neal was hired by the Blade-Tribune (Tr. 260-261). Between that date and the hearing he made no effort to withdraw his application even though by his own testimony he was aware that he was a Union member when the demand was made (Tr. 263-264). On February 8, Neal attended a Union meeting, and when Mason saw him, he remembered that when Neal joined the Union he paid the full membership fee rather than the lower "amnesty" fee that the new applicants paid during organizing campaigns. Mason reminded Neal of this and told

²⁷ The failure to repudiate an application while testifying has been held indicative of continued support of the Union. See *N.L.R.B. v. Greenfield Components*, 317 F. 2d 85, 89 (C.A. 1).

that it “wasn’t proper that he should pay more than anyone else” and that he would arrange a refund for the difference (R. 25-26; Tr. 359). Neal agreed. Later, when Mason returned the money to him, Neal merely thanked him for his consideration (Tr. 360). At no time did Neal try to revoke his application or ask that the entire fee be returned.²⁸ Accordingly, Neal’s authorization, like that of the other four employees in this category was properly counted.

The Company also argues that the Board should not have counted the card of David Wanner, because prior to signing the card he notified the Company of his intention to terminate his employment. In ruling that the card should be counted, the Board applied its judicially approved rules for determining voting eligibility—that is, an employee may vote in an election even though prior to the election he announces his intention to quit. *General Tube Co.*, 141 NLRB 441, 444-445, enforced, *N.L.R.B. v. General Tube Co.*, 331 F. 2d 751 (C.A. 6); *Ely & Walker*, 151 NLRB 636, 654; *Personal Products Corp.*, 114 NLRB 959, 961. The

²⁸ In arguing that Neal tried to withdraw from the Union the Company relies on Neal’s discredited testimony that he told Mason he could not support the Union. Mason credibly testified that Neal did not make such a statement (R. 26; Tr. 360); however, and the Trial Examiner discredited Neal’s version of the conversation. Clearly the matter of crediting and discrediting witnesses rests with the Trial Examiner (*N.L.R.B. v. R. J. Lison Co., Inc.*, — F. 2d —, 65 LRRM 2928, 2930 (C.A. 9, No. 20,879, decided June 26, 1967); *N.L.R.B. v. Ace Comb Co.*, 342 F. 2d 841, 844 (C.A. 8)) and the Company points to nothing which would warrant reversing that finding.

rule is based on the administrative necessity of drawing a line for determining eligibility and upon the assumption that employees often speculate about terminating employment. Thus, although Wanner gave the Company three months' notice in December 1964, he was still in the employ of the Company at the time of the hearing a year later, in December 1965 (Tr. 189). Contrary to the Company's argument, the Board's reliance on the voting eligibility rules was not misplaced. Clearly, if an employee who intends to quit has enough interest in the outcome of the election to express his views by a secret ballot, then he also has enough interest to express them by executing the membership application. This is particularly so where, as here, even if Wanner had quit 3 months after giving notice, he would still have been in the unit for one and a half months after the Company's bargaining obligation arose (Tr. 198).²⁹

The Company also argued that Wanner had no intention of designating the Union as a collective bargaining representative. In the first place, it is well settled that, "[A]n employee's thoughts (or afterthoughts) as to why he signed a union card . . . cannot negative the overt action of having signed a card designating the union as bargaining agent." *Joy Silk Mills v. N.L.R.B.*, 185 F. 2d 732, 743 (C.A. D.C.);

²⁹ If, however, the Court finds that Wanner's application should not be counted, then he should also be excluded from the unit for purposes of determining the Union's majority for if he does not have sufficient interest to be counted toward majority, his presence should not hinder the wishes of the remaining employees to be represented.

Accord: *N.L.R.B. v. Hyde*, 339 F. 2d 568, 570 (C.A. 9); *Colson Corp. v. N.L.R.B.*, 347 F. 2d 128, 135 (C.A. 8), cert. denied 382 U.S. 904. Thus even if the Company's contention that Wanner signed only because he wanted to work in a Union shop after he left the Company were supported by evidence, such evidence would not be sufficient to rebut the presumption raised by the signed application. Further, the evidence amply demonstrates that Wanner knew the purpose of the application, for he credibly testified that prior to signing, Union president Mason told him that "this was not only an application for membership, but this also was an authorization for the union to be the—negotiate for me, or to represent me to the Blade-Tribune" (Tr. 205).

The Company's contentions with regard to the last two cards it challenges, Kopp's and Eugenia (Smith) Wanner's, simply raise questions regarding credibility resolutions and the substantiality of the evidence. The Company claims that Mason misrepresented the card's purpose to Kopp at the time Kopp signed, and that Kopp did not understand the purpose of the card. But the Trial Examiner discredited Kopp's testimony that Mason told him the application was only to see how they would do in an election because it was uncorroborated and because he found Kopp to be an unreliable witness (R. 23). Kopp signed the application on January 14, when he attended a Union meeting with Harrington, Bowman and Casebolt, (R. 23; Tr. 284, 281). Kopp's version of what Mason said at the meeting is not corroborated

by either Bowman or Harrington, both of whom testified at the hearing. In fact, Harrington's testimony, corroborating Mason, indicates that there was no misrepresentation, but that the purpose of the application was properly explained (R. 23; Tr. 69, 74-75).³⁰ Kopp also had a great deal of trouble remembering what had happened during the whole period in question (Tr. 280, 281, 282, 289, 291, 294). Clearly his testimony was too unreliable to support a finding that Mason misrepresented the purpose of the card.

Finally, the Company contends that the evidence does not support the finding that Eugenia Wanner signed her card before the bargaining demand was made. Although she could not recall the date she signed (Tr. 211), her application is dated January 14 (G.C. Exh. 12). Mason testified that he received it that day (R. 16; Tr. 81), and that David Wanner, who signed on the same day (G.C. Exh. 11), brought her to the motel after he had spoken to Mason about joining the Union (Tr. 225). David Wanner testified that Eugenia was present when he signed his application on January 14 (Tr. 201). He was not asked whether Eugenia signed the same day. Clearly, substantial evidence supports the Board's finding that Mrs. Wanner signed the application on January 14, the date appearing thereon, and the card was properly counted.

³⁰ Bowman was not asked about what happened at the meeting and Casebolt did not testify.

B. The alleged good-faith doubt

The Company also contended before the Board that even if the Union in fact represented a majority of the employees in an appropriate unit—that is, the unit described in the Union’s demand—the Company doubted both the existence of that majority and appropriateness of the unit sought. As noted above, the Company rejected the Union’s original request out of hand, and *then* questioned employees concerning their support of the Union. The interrogations, however, were designed, not to ascertain the truth of the Union’s claim, but to destroy the Union’s majority, for as we show above, pp. 11-16, they were carried out in a highly coercive manner. Braden also used the period afforded by his rejection of the Union’s claim to determine *why* the employees desired a union, so that he could cure the disaffection of a sufficient number of employees to defeat the Union. Those who simply wanted more money or economic fringes—like a pension plan—were promised those benefits, while Agneta—the one employee revealed as a staunch unionist who looked forward to a rigorous grievance procedure—was driven from the shop following his foreman’s announcement that this would happen to him.

The alleged doubt concerning the unit is equally demonstrative of the Company’s bad faith. The Company first questioned the unit almost a month after the Union’s demand, but when the Union acquiesced in a “traditional composing room unit” and sought a card check, the Company fell back on its contention that the Union had no majority. As this Court has

noted, if the Company actually questioned the unit, "its proper course" was to exclude those persons whom it thought were not properly in the unit and bargain with respect to the others, "not to refuse to bargain altogether." *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F. 2d 902, 908 (C.A. 9). Here the Company refused to do so even after the Union agreed to a smaller unit. Finally, after its last refusal to bargain, the Company consented to an election in the unit originally requested by the Union. As nothing occurred between the time of the Union's original demand and the signing of the consent agreement to have altered the Company's position, its later agreement to an election in the broader unit is indicative of its lack of a well-founded doubt regarding that unit's appropriateness.³¹

³¹ Before the Board the Company argued that the *Garden Island Publishing Company* case, 154 NLRB 697, which the Trial Examiner cited in finding that the unit originally requested was appropriate, was not issued until August 1965, after the Company rejected the Union's demand. It argues that prior to the issuance of the decision it did not know that the requested unit was appropriate. As indicated at footnote 6 of the *Garden Island* case, however, the Board has long found such units to be appropriate. See *Worzella Publishing Co.*, 121 NLRB 78.

Thus, the very most that the Company could argue here is that its doubt of the appropriate unit was based upon a mistake of law. It has repeatedly been held, however, that an employer questions the appropriateness of a unit at his peril, for even his good-faith doubt as to its appropriateness—including doubt based on a mistake of law—does not justify his refusal to bargain if the unit was in fact appropriate. See, for example, *N.L.R.B. v. Keystone Floors, Inc.*, 306 F. 2d 560, 563-564 (C.A. 3); *United Aircraft Corp. v. N.L.R.B.*, 333

Accordingly, on this record the Board was clearly justified in finding that the Company's refusal to recognize the Union was "due to a desire to gain time and to take action to dissipate the Union's majority . . . [and hence] constitutes a violation of the duty to bargain set forth in Section 8(a)(5) of the Act" (*Joy Silk Mills v. N.L.R.B.*, 185 F. 2d 732, 741 (C.A. D.C.)). See *Retail Clerks Union, Local No. 1179 (John P. Serpa, Inc.) v. N.L.R.B.*, 376 F. 2d 186 (C.A. 9) and cases cited *supra*, p. 24, n. 23.

C. The Board properly issued a bargaining order

As shown in the Statement, the Union lost the election following the Company's interference with the employees' free choice. Since the Union had majority support at the time of its original demand, however, the Board ordered the Company to bargain with the Union for a reasonable time. This Court and the other courts of appeals which have passed on the issue have uniformly upheld the Board's power to issue a bargaining order under such circumstances. *Master Transmission Rebuilding Corp. v. N.L.R.B.*, 373 F. 2d 402.³² For, by ordering the employer to recognize and bargain with the Union in such situations, the

F. 2d 819, 822 (C.A. 2), cert. denied, 380 U.S. 910; *Florence Printing Co. v. N.L.R.B.*, 333 F. 2d 289, 291 (C.A. 4); *Northern Virginia Steel Corp. v. N.L.R.B.*, 300 F. 2d 168, 175 (C.A. 4); *N.L.R.B. v. Primrose Supermarket of Salem, Inc.*, 353 F. 2d 675 (C.A. 1), cert. denied, 382 U.S. 830.

³² *International Union of Electrical, Radio and Machine Workers (S.N.C. Mfg. Co.) v. N.L.R.B.*, 352 F. 2d 361, 363 (C.A. D.C.), cert. denied, 382 U.S. 902; *Amalgamated Cloth-*

Board vindicates the employees' right to be represented by the union they freely designated and "gives to the [u]nion no more than it could fairly claim" was its due when, as the validly designated representative, it sought and was denied recognition. *Irving Air Chute v. N.L.R.B.*, 350 F. 2d at 182.

Although the Company does not contest the Board's general power in this respect, it contended before the Board that the Company's interference in the election was too minor to warrant such an order. We submit that the Board's inference that the Company's unlawful conduct had its natural and intended effect on the Union's support was well within the Board's province as the primary finder of fact. *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17, 48-52. As the Second Circuit said in *N.L.R.B. v. Stow Manufacturing Co.*, 217 F. 2d 900, 905, cert. denied, 348 U.S. 964: "The Board is the tribunal to determine the effect of what was done upon the minds of the employees." Accord: *N.L.R.B. v. Moore's Seafood Products, Inc.*, 369 F. 2d 488, 490 (C.A. 7). The Board was equally justified in finding that this same conduct necessitated a

ing Workers of America (Edro Corp.) v. N.L.R.B., 345 F. 2d 264 (C.A. 2); *Irving Air Chute Co. v. N.L.R.B.*, 350 F. 2d 176, 182 (C.A. 2); *Colson Corp. v. N.L.R.B.*, 347 F. 2d 128, 138-139 (C.A. 8), cert. denied, 382 U.S. 904; *N.L.R.B. v. Frank C. Varney Co.*, 359 F. 2d 774 (C.A. 3); *Borden Cabinet Corp. v. N.L.R.B.*, 375 F. 2d 891 (C.A. 7); *Wausau Steel Corp. v. N.L.R.B.*, 377 F. 2d 369, 373 (C.A. 7); *N.L.R.B. v. Southbridge Sheet Metal Works*, — F. 2d — (C.A. 1, No. 6875, 65 LRRM 2916, 2917). See also, *Furr's, Inc. v. N.L.R.B.*, — F. 2d — (C.A. 10, No. 8686, 64 LRRM 2422, 2426).

bargaining order as the only effective remedy. "To devise appropriate remedies and to gauge when the labor atmosphere has been cleared so that a new election may be held are within the Board's discretion." *Wausau Steel Corp. v. N.L.R.B.*, *supra*, 377 F. 2d at 374. See also, *Fibreboard Corp. v. N.L.R.B.*, 379 U.S. 203, 215-216; *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194.

Thus, as summarized, *supra*, p. 33, in connection with the Company's related contention with respect to its alleged good-faith doubt, these violations were repeated over an extended period, involved the Company's highest official, and ranged up to what was, in effect, the discharge of the Union's leading supporter. The circumstances here were thus clearly distinguishable from the facts in the cases cited by the Company, in which the Board either found no bad faith or withheld a bargaining order. For the instant case is far removed from the single 8(a)(1) violation in *Harvard Coated Products, Inc.*, 156 NLRB 162, 163, the threat by a low-level supervisor in *Strydel, Inc.*, 156 NLRB 1185, 1186-1188, or the single 8(a)(1) violation occurring two months before the demand in *Clermont's*, 154 NLRB 1397, 1401.

Furthermore, a bargaining order is particularly appropriate in a case such as this, if only to remedy the Company's unlawful attempts to dissipate the Union's majority. Such an order is prospective and merely restores to the Union its status as majority representative and thus denies to the Company the fruits of its misconduct. *N.L.R.B. v. Delight Bakery*,

Inc., 353 F. 2d 344, 346-347 (C.A. 6); *United Steelworkers of America, AFL-CIO (Northwest Engineering Co.) v. N.L.R.B.*, 377 F. 2d 140 (C.A. D.C.); *Wausau Steel, supra*, 377 F. 2d at 374 *D. H. Holmes Co. v. N.L.R.B.*, 179 F. 2d 876, 879-880 (C.A. 5).³³

Of course, the Company may later file a petition for an election, and the Board "upon a proper showing, [will] take steps to recognize changed conditions including any shift in the attitude of the employees" (*N.L.R.B. v. Hamilton Co.*, 220 F. 2d 492, 494 (C.A. 10)). Accordingly, the Board's bargaining order may be replaced by a representation election after the Company has bargained with the Union for a reasonable time. Indeed, such a course will allow a fair test of the Company's assertion that the employees have lost interest in collective bargaining. The imposition of any greater limitation—that is, a requirement that the Union first win an election before being given bargaining authority—was summarily rejected by the Supreme Court in *N.L.R.B. v. International Union Progressive Mine Workers of America*, 375 U.S. 396, reversing *per curiam* in this respect 319 F. 2d 428, 437 (C.A. 7).

³³ See also, *Local No. 152 v. N.L.R.B.*, 343 F. 2d 307, 309 (C.A. D.C.); *N.L.R.B. v. Caldarrera*, 209 F. 2d 265, 268-269 (C.A. 8); *Greystone Knitwear Corp.*, 136 NLRB 573, 575-576, enforced *per curiam*, 311 F. 2d 794 (C.A. 2); *Summit Mining Corp. v. N.L.R.B.*, 260 F. 2d 894, 900 (C.A. 3); *Piasecki Aircraft Corp. v. N.L.R.B.*, 280 F. 2d 575, 591-592 (C.A. 3), cert. denied, 364 U.S. 933; *Editorial "El Imparcial" Inc. v. N.L.R.B.*, 278 F. 2d 184 (C.A. 1).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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DOMINICK L. MANOLI,
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MARCEL MALLET-PREVOST,
Assistant General Counsel,

ELLIOTT MOORE,
BURTON L. RAIMI,
Attorneys,

National Labor Relations Board.

September 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

WESTERN UNION
TELEGRAMW. P. MARSHALL, *President*

The filing time shown in the date line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME at point of destination

1154A PDT OCT 5 65 LC262 OJ204
O SDA325 PD 2 EXTRA SAN DIEGO CALIF
5 1137A PDT

NATIONAL LABOR RELATIONS BOARD
21ST REGION ROOM 600 849 SOUTH BROADWAY
ATTN MILTON BOYD

LOSA

CASE #21-CA-6808 REGARDING BLADE TRIBUNE PUBLISHING COMPANY, REQUEST WITHDRAWAL OF SECTION EIGHT (A)(E) ALLOCATIONS IN LAST PARAGRAPH OF CHARGE. BUT WITH NO DISAVOWAL OF REMAINING ALLOCATIONS

CARL H MASON PRESIDENT SAN DIEGO TYPOGRAPHICAL UNION #221

Section 8(a)(3) allegations allegations

#21-CA-6808(A)(3) #221

(46). Partial

WITHDRAWAL REQUEST APPROVED:
October 8, 1965

/s/ Ralph E. Kennedy
RALPH E. KENNEDY, Regional Director

APPENDIX B

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages,

hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 10

* * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion

at any time prior to the issuance of an order based thereon.

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to

APPENDIX C

INDEX TO REPORTER'S TRANSCRIPT

(Numbers are to pages of reporter's transcript)

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<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received In Evidence</u>
1	7	7	8
2	13	13	13
3	14	14	15
4	14	14	15
5	14- 15	14-15	15
6	15	15	15
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<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received In Evidence</u>
1	239	239	240
2	342	342	343
3	342	342	343
4	342	342	343
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Stipulation of Employees in Unit	22-23		All parties agree	24	

DEC 14 1967

No. 21,860

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BLADE-TRIBUNE PUBLISHING COMPANY, RESPONDENT

SAN DIEGO TYPOGRAPHICAL UNION, LOCAL 221, INTERNATIONAL
TYPOGRAPHICAL UNION, AFL-CIO, INTERVENOR

On Petition for Enforcement of an Order of the
National Labor Relations Board

RESPONDENT'S BRIEF

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Los Angeles, California

Attorneys for Respondent

FILED

DEC 11 1967

WM. B. LUCK, CLERK

DEC 14 1967



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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BLADE-TRIBUNE PUBLISHING COMPANY, RESPONDENT

SAN DIEGO TYPOGRAPHICAL UNION, LOCAL 221, INTERNATIONAL
TYPOGRAPHICAL UNION, AFL-CIO, INTERVENOR

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent is submitting the following statement of facts which includes certain facts found by the Trial Examiner and adopted by the National Labor Relations Board (hereinafter "Board") or uncontradicted in the record which were not included in the statement of facts in Petitioner's Brief.

Respondent is a California corporation having its principal place of business in Oceanside, California, where it publishes and distributes a daily newspaper.

From time to time during the several years preceding 1965, Carl Mason, President of San Diego Typographical Union, Local 221 (hereinafter "Union"), had been in

Respondent's place of business attempting to solicit membership in the Union. (Tr. 353)* However, Mason became ill in July 1964, and ceased his organizational activities among Respondent's employees until early in 1965. (Tr. 79)

On or about January 15,** Mason sent a telegram and identical letter to Respondent's publisher, Braden, which stated that the Union represented a majority of employees in Respondent's mechanical departments and that the Union was prepared to meet for negotiations. (Tr. 11, 12, 80; G. C. Exh. 22) The telegram contained no offer to prove the claim of majority representation.

Braden first saw the telegram a few days later and, after conferring with his attorney, replied on or about January 20. (Tr. 12) The reply expressed Braden's doubts that the Union represented a majority of employees in any appropriate collective bargaining unit. It also suggested that the questions of majority status and appropriate unit be resolved through the National Labor Relations Board. (G. C. Exh. 2)

From on or about January 20 to on or about February 4, Braden interviewed thirteen of his employees to ascertain whether any of them had, in fact, authorized the Union to represent them. (Tr. 34, 325-334)

Before each interview, Braden showed or told the employees of the Union's January 15 telegram and explained that he wished to find out if it was correct. He also explained that they need not answer any questions, nor fear any reprisals if they did. (Tr. 325-326)

* References designated "Tr." are to the reporter's transcript of testimony. References designated "G.C. Exh." and "R. Exh." are to exhibits of the General Counsel and Respondent, respectively. References designated "R." are to volume 1 of the record herein.

**All dates refer to 1965 unless otherwise designated.

Braden was advised by a majority of the employees in the mechanical departments, including a majority in the composing room, that they had not designated or did not wish the Union to act as their collective bargaining representative. (Tr. 62, 139, 141, 192, 198, 213, 220, 262, 269, 270, 326, 331-334)

On or about February 4, the Union's attorney wrote to Braden and offered for the first time to prove that the Union represented a majority of Respondent's employees in a combined mechanical department unit. (G. C. Exh. 3)

On or about February 11, Respondent's attorney replied as follows:

"... prior to the receipt of your letter of February 4, 1965, an investigation was conducted for the purpose of determining whether or not Mr. Mason's claim that the employees in the mechanical departments of the Blade-Tribune Publishing Company desired San Diego Typographical Union Local 221 to represent them in collective bargaining was correct. We are advised that as a result of such investigation the Blade-Tribune Publishing Company genuinely doubts that such Union does represent a majority of its mechanical department employees or any other employees in an appropriate collective bargaining unit ...

We suggest that these questions of appropriateness of a bargaining unit and majority status of the San Diego Typographical Union Local 221 be decided by the National Labor Relations Board in a representation proceeding. . . ." (G. C. Exh. 4)

The Union did not reply for almost a month. Then, on or about March 9, the Union's attorney wrote Respondent's attorney:

“Please be advised that ITU Local 221 will consent to an expeditious procedure for determining its majority status in the traditional composing room unit. . . .” (G. C. Exh. 5)

On March 15, Respondent’s attorney replied:

“... the Union is apparently willing to consent to an expedited procedure for determining the Union’s majority status with respect to employees in the composing room unit only. This represents a departure from the Union’s original position that the appropriate unit consisted of all employees in the mechanical departments . . . the Company has a good faith doubt that Local 221 represents a majority of the composing room employees and . . . the Company has reason to doubt the validity of any authorization cards obtained by Local 221. . . . [T]he Company is willing to enter into a consent election agreement under the rules of the National Labor Relations Board for a representation election among the employees in the appropriate collective bargaining unit.” (G. C. Exh. 6)

The Union did not reply. On or about March 22, Respondent filed an RM Petition with the Twenty-First Region of the Board. (Tr. 340; R. Exh. 2) Thereafter, on April 6, Respondent and the Union entered into an Agreement for Consent Election. (R. Exh. 3)

During the month before the election, Braden took most of Respondent’s employees to lunch, in groups ranging from one to four. (Tr. 36, 345)

The election, which was held on May 5, resulted in a vote of 15 to 8 against representation by the Union. (Tr. 20)

Employee Agneta quit Respondent’s employ on or about May 7. (Tr. 166-167)

Thereafter, the election was set aside on the basis of a timely objection filed by the Union.* (G. C. Exh. 7) On June 28, charges alleging violations of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (hereinafter "Act"), 29 U.S.C. §§151-168, were filed and duly served. [G. C. Exh. 1(a), 1(b)] Subsequently, that portion of the foregoing charges alleging a violation toward employee Agneta was withdrawn by the Union. (Tr. 131)

On October 8, the Complaint herein issued alleging violations of Section 8(a)(1) and (5) of the Act. [G. C. Exh. 1(c)] At the hearing before the Trial Examiner, amendment of the Complaint to allege a violation toward Agneta was allowed over Respondent's objection that such amendment was barred by Section 10(b) of the Act. (Tr. 130-133)

QUESTIONS PRESENTED

1. Is there substantial evidence in the record to support a finding that on January 15, 1965, the Union represented a majority of Respondent's employees?

2. Is there substantial evidence in the record to support the findings as to Respondent's unlawful course of conduct between the time of the Union's demand and the election?

3. Should a bargaining order be enforced under circumstances where, at best, only minimal Section 8(a)(1) violations have occurred?

* Contrary to the suggestion of Petitioner, at p. 24 of its Brief, Respondent has *not* conceded that "the election did not allow the employees to exercise their free choice." (See Tr. 18-21)

ARGUMENT

I.

THE BOARD'S FINDING THAT THE UNION REPRESENTED A MAJORITY OF RESPONDENT'S EMPLOYEES ON JANUARY 15, 1965 IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Board concluded that on January 15 the Union represented 13 of 22 employees in an appropriate bargaining unit. This two-employee majority consisted of four dues-paying members (Moses, Craig, Thompson and Casebolt) and nine employees who had signed Union membership applications [Jochheim, Neal, Metzger, Bowman, Agneta, Harrington, Kopp, David Wanner, and Eugenia (Smith) Wanner]. In so deciding, the Board overruled the Trial Examiner's finding that the application of Jochheim should not be counted.*

It is Respondent's contention that the Board's determination of majority status was erroneous inasmuch as at least three of the applications for membership cannot be considered reliable evidence to support a finding that as of January 15, the Union represented the three employees whose signatures they bore.

While it is true that the validity of a properly executed authorization card or membership application ordinarily will be presumed, there are instances in which the circumstances surrounding the execution of authorization cards require their exclusion. See, *e.g.*, *Conso Fastener Corp.*, 120 NLRB 532, 535 (1958) (Testimony of witness "so vague and inconclusive as to cast serious doubt upon whether she signed her card before" union demand for recognition; *held*, "General Counsel has failed to sustain

* The Board adopted the rest of the Trial Examiner's findings.

the burden of proving the validity of her card and it must be rejected.”)

The first application which Respondent submits was erroneously included by the Board was that of Jochheim.

The Board’s determination that Jochheim’s application was a valid designation of the Union as bargaining agent on January 15 was a rejection of the Trial Examiner’s express holding to the contrary. The application was made on July 31, 1963, nearly a year and one-half before the Union’s bargaining request. While noting that Jochheim’s action in completing Union membership requirements on August 6, 1965, did lend some support to a presumption of “continued viability” of his application, the Trial Examiner noted that “under all the circumstances I consider his action . . . as being too remote in time to demonstrate his continued adherence to his designation of the Union as collective bargaining representative at the critical date.” (R. 25)

In its Brief, the Board concedes that its rule is that bargaining authorizations generally will not be counted if *more than a year old*, but urges that an exception exists where an application was signed during the same organizing campaign as that leading to the request to bargain, citing *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514 (1953), *enforced*, 218 F.2d 917 (9th Cir. 1955); *The Grand Union Co.*, 122 NLRB 589 (1958), and *Safeway Stores, Inc.*, 99 NLRB 48 (1952). The Board concluded that Jochheim’s application came within this exception because it was taken during a single organizing campaign which was interrupted by the filing and processing of unfair labor practice charges.

Respondent submits that the record does not support a finding that Jochheim’s application was signed during the same organizing campaign as that leading to the

bargaining request. On the contrary, all that the probative evidence shows is that applications were accumulated over the course of several years.* The Board has not only erroneously characterized such activity as a “single organizing drive,” but has further erroneously patched such intermittent activity together with a finding that a long hiatus in such “single campaign” occurred because the campaign was interrupted by unfair labor practice proceedings.

In the instant case, Jochheim signed an application on July 31, 1963. There is no affirmative evidence in the record that his application was executed during *any* organizational campaign. The record simply shows that Jochheim voluntarily went to Mason’s office on July 31, 1963, and signed an application. (Tr. 89)

The only specific reference to any organizing efforts in 1963 was that made by the Union’s International Representative, Prarie, in response to a question by Union counsel about another employee:

Q (By Mr. Williams) How did you happen to take that authorization card from Mr. Metzger, Mr. Prarie?

A I was assisting the union in a *previous organizational drive that had been started some time in 1963*, as I recall, and I had made an additional trip.

* The applications bear the following dates: April 4, 1963; July 31, 1963; February 11, 1964; February 12, 1964; October 1, 1964; January 14, 1965. The last-mentioned date is the only one to appear on more than one application.

I think that I was in here the latter part of '63, and in early '64. . . ." (Tr. 372) (Emphasis added)*

Nevertheless, the Board relied upon *Knickerbocker Plastic Co., Inc.*, *supra*, as authority to count Jochheim's card.

In *Knickerbocker* there was an *intensive* organizational campaign which began in about June of 1950 and culminated in an election in September of 1950. The election was lost as a result of the employer's unfair labor practices and was set aside. The campaign actively resumed again in January or February of 1951 and continued until the middle of 1951. Under these particular circumstances, the Trial Examiner found that cards executed in June or July of 1950 were still valid a year later:

"Nine of these cards were signed in June 1950; of the remaining 3, 2 were signed in July and 1 in September of that year. It will be recalled that this was during the initial stages of the organizational campaign by Machinists which culminated in an election in September 1950. This election was lost by the Union as a result of Respondent's unfair labor practices and the election was later set aside. The campaign resumed in January or February of 1951, as hereinabove described. *Under these circumstances*, the undersigned deems this group of cards to be reasonably current cards signed in support of Machinists during the *same* organizational campaign and properly receivable in evidence, although, as

* Neither the Trial Examiner nor the Board acknowledged the foregoing testimony of Mr. Prarie. Respondent argued to both that Prarie's testimony describing a "previous organizational drive" with respect to Respondent's employees should be relied upon not only to support the exclusion of Jochheim's application, but also to exclude the applications of Metzger (February 11, 1964) and Bowman (February 12, 1964), neither of which was ever reaffirmed before January 15, 1965.

will appear, some have not been included for other reasons.” (104 NLRB at 529-530) (Emphasis added)

Thus in *Knickerbocker*, where the Union’s organizational efforts culminated in an election which the Union lost *as a result* of the Employer’s proven unfair labor practices, the pre-election and post-election campaigns were constructively deemed a single campaign.

There is nothing in the decision which suggests that if a union unilaterally decides to cease organizational efforts during the period that an unfair labor practice charge is filed, authorizations taken before the cessation will be deemed to have been taken in the “same” organizational effort as may occur later.

Furthermore, in *Knickerbocker* there were proven unfair labor practices. In the instant case, there were not. On March 26, 1964, a charge against Respondent was filed. On June 26, 1964, the Regional Director for Region 21 of the Board approved a settlement of the foregoing charge which Settlement Agreement expressly provided, “DISCLAIMER — By signing this agreement the Employer does not admit any any (*sic*) violation of the Act.*

There is no proof that whatever campaign efforts were going on were interrupted, in a *causal* sense, by the foregoing unproven charges.** Moreover, even if it is assumed

* The Trial Examiner took judicial notice of the earlier charge and settlement agreement in Case No. 21-CA-5854 for the limited issue of whether the applications of Jochheim, Neal, Metzger and Bowman were taken during a single campaign which was interrupted by unfair labor practice charges. (Tr. 243-250)

**Prarie, whose testimony constitutes that only evidence offered on the issue of the relationship between the alleged unfair labor practices and the cessation of organizational activity, at no time testified that the cessation was *caused* by any acts of Respondent. His testimony reveals no more than that, during the processing of unfair labor practice charges, the Union did not engage in organizational work. (Tr. 370-379)

that the Union's cessation of such efforts amounted to an "interruption," there is *no* evidence in the record that any organizing attempts resumed soon after June 26, 1964. What the record shows is that organizational efforts did not commence again for many months, *not because of the unfair labor practice charge*, but because of the illness of Mason:

"... I had been ill up until — *I had been off ill from July until about the latter part of October in '64, and it wasn't until after the first of the year that I could get back to the organizational work in Oceanside.* ... " (Tr. 79) (Emphasis added)

There is no evidence in the record that anyone other than Mason engaged in any organizational activity between June 1964 and January 1965. Only one application was executed during the eleven-month period between February 1964 and January of 1965, that of Agneta on October 1, 1964.* The record is barren of any description of the circumstances under which it was executed.

However, on January 14, 1965, some five applications were executed. Thus, if there were ever *any* "intensive" organizing campaign, it was during the period after Mason returned from his illness. To say, as the Board does in its Brief, at p. 26, that an application such as Jochheim's, executed a year and one-half before the Union's demand, should be counted "since the time lapse between signing and bargaining was due to the Company's unfair labor practices. . . ." is to absolutely ignore the record.

As Respondent has demonstrated, the *Knickerbocker* rule is not properly applicable to this case so as to characterize the period during which Jochheim signed his appli-

* G. C. Exh. 15

cation as part of the same campaign which led to the Union's request to bargain. Even if it were, however, Respondent submits that Petitioner has misapplied the *Knickerbocker* decision so as to include Jochheim's application.

The Board in *Knickerbocker* held no more than that two periods of Union organizational activity will be deemed to constitute one organizing campaign when the hiatus is caused by an employer's unfair labor practices. Having decided by the application of that rule that all the authorization cards involved therein were signed during one campaign, the Board then found that those cards met the *two* basic criteria of reliability: (1) they were reasonably current, and (2) they were obtained during the same organizational campaign which culminated in the request to bargain.

The relevance of these criteria is unquestionable. With respect to the age of the cards, the United States Court of Appeals has recently observed that where cards are obtained over a period of time, "there is no assurance that an early signer is still of the same mind on the crucial date when the Union delivers its bargaining demand." *NLRB v. S. S. Logan Packing Co.*, F.2d, L.R.R.M. (4th Cir., decided October 27, 1967), at pp. 8-9 of slip opinion. The importance of the second factor is equally obvious. If the Union should abandon an organizing campaign voluntarily, later resuming its organizing activities and demanding recognition, the reliability of an authorization card obtained prior to the abandonment would be highly suspect even if it had been obtained *within one year* prior to the demand.

Knickerbocker created an exception which applies *only* to this latter factor. Thus, where the cessation of organizational activity is due not to a lack of union enthusiasm

for the task, but to harassment by the employer, it will not be assumed that the commitment to the union expressed in the authorization card has been recanted if the cards are *otherwise* reasonably current.

Knickerbocker cannot be read as an exception to the requirement that cards be current, for the cards involved in that case *were*, in the words of the decision, “reasonably current cards.” 104 NLRB at 530. In fact, the oldest card in *Knickerbocker* was signed no more than 13 months prior to the bargaining request. 104 NLRB at 529.*

In the instant case, however, an application executed one and one-half years before the demand, as was Jochheim’s, is *not* reasonably current. That application was not, therefore, reliable evidence of Jochheim’s desire as of the time of the demand to designate the Union as his bargaining representative. The Trial Examiner recognized this, for despite finding, by application of the *Knickerbocker* rule, that Jochheim had signed during the same organizational campaign which led to the January 15 demand, he ruled that Jochheim’s application was too stale to be counted. (R. 25) Respondent submits that the Board’s contrary determination was erroneous.

The next application which should have been excluded is that of Neal. It was conceded at the hearing before

* In *Safeway Stores, Inc.*, *supra*, cited also in *Knickerbocker*, 104 NLRB at 530, the bargaining demand was made on August 26, 1950. The Board held that, at that time, the union had a majority of the 29 employees in the appropriate unit. Sixteen of the twenty-one authorization cards had been signed between August 22 and August 26, 1950, and five were dated “in 1949.” There is no indication that those five cards were, in fact, more than one year old. And in *The Grand Union Company*, 122 NLRB 589 (1958), where the Board held invalid those cards which had been obtained more than one year before a bargaining demand, it noted that the majority in *Safeway* did not depend upon the 1949 cards. 122 NLRB at 590 n. 1. Therefore, these cases cited at pp. 25-26 of Petitioner’s Brief are inapposite.

the Trial Examiner that Neal's application for Union membership "was made long before" any effort to organize Respondent's employees "and for a different purpose." (Tr. 267) Neal had signed an application on April 4, 1963, *before* he was employed by Respondent, in order to secure employment at a San Diego newspaper. (Tr. 91, 262) He did not become a Union member.*

Neal was first employed by Respondent in May of 1964. (Tr. 260) Neal testified that after leaving San Diego he had completely forgotten about the 1963 application until some time *after* the Union's telegram of January 15. (Tr. 263) It was not until "on or about February 8, 1965," according to the Union's secretary, nearly a month *after* the Union's demand for recognition, that Neal's 1963 application was "renewed . . . on an amnesty basis." (Tr. 91-92)**

It is clear from the foregoing that Neal's application was not taken during *any* organizational effort with respect to Respondent's employees. Furthermore, at no time between April 4, 1963, and January 15, 1965 did Neal ever reaffirm his application.***

The finding of the Trial Examiner, adopted by the Board, that "Neal's application for membership was viable when the Union demanded recognition" on Janu-

* In its Brief at p. 28, the Board states that "Neal's application was executed in April 1963, and he was *then admitted to membership*. . . ." Such statement is not correct and contradicts the Trial Examiner's finding that Neal had not become a member because he had not taken the oath. (R. 25)

**Mr. Ratliff, the Union's secretary, described Neal's application of April 4, 1963 as one which had "laid dormant for a long time." (Tr. 98)

***The Board requires reaffirmation to the Union of authorizations which are not current if they are to be considered valid designations. *The Grand Union Co., supra*. It will be recalled that Jochheim did *not* reaffirm his application prior to January 15.

ary 15 because it was renewed almost a month *later* (R. 25-26) has no basis in precedent or in common sense.

The next application which should have been excluded on the basis that General Counsel did not sustain his burden or proving its validity is that of Eugenia Wanner (who was Eugenia Smith on January 15).

Mrs. Wanner testified that as of the date of an interview with Mr. Braden sometime *after* January 15, 1965 (Tr. 209-210, 212, 333) she had not signed anything:

“Q (General Counsel) At the time of his interviewing you, had you yet signed an application in the Union?

“A No.

“Q It (the interview) was *prior* to the date of your having signed the application which is in evidence here?

“A Yes.” (Tr. 210) (Emphasis and parenthetical added)

Mrs. Wanner remained equally firm and certain on cross-examination. (Tr. 213) Her testimony was corroborated by Braden. (Tr. 333)

Notwithstanding this testimony, which was not discredited by the Trial Examiner, the Board adopted a finding that Eugenia had signed her application on January 14, its *typewritten* date. (G. C. Exh. 12) In making this finding, the Trial Examiner noted the testimony of David Wanner who stated that Eugenia had been with him at the time *he* signed an application. (Tr. 200, 201) *However, Wanner did not testify that he saw her sign anything.* The Trial Examiner commented on this as follows:

“I attach no significance to the fact that David Wanner testified merely that Mrs. Wanner was

present at the Union's headquarters when he signed the application, and did not testify that he saw her sign. David Wanner preceded his wife on the witness stand, hence there was no occasion at that time for the General Counsel to interrogate him regarding Mrs. Wanner's signing." (R. 22 n. 14)

The foregoing is correct as to the sequence of witnesses, but it absolutely ignores the point that once Mrs. Wanner testified clearly and unequivocally that she did not sign an application until some later date, General Counsel did not recall David Wanner in order to try to sustain his burden of proving the validity of her application.

The Trial Examiner also noted that, according to the credited testimony of Mason, Eugenia's application was signed on January 14, 1965. (R. 22) However what Mason said was as follows:

First, in identifying Eugenia's application:

"Exhibit 12, Eugenia G. Smith, January 14, 1965, is correct." (Tr. 81)

Later:

"I believe, to the best of my recollection, on David Wanner — I spoke to him first, and then, if I am not mistaken, he went back and brought, at that time, Eugenia Smith back with him.

"I am not positive on it" (Tr. 225)

This is not an instance where the Court need be concerned with overturning a Trial Examiner's credibility findings. It is simply a situation where there is considerable doubt as to whether Eugenia Wanner signed an application on January 14, 1965 or at some later date. Because of this doubt, General Counsel did not sustain his burden of proving the validity of the application on the critical date, and the application should not have been

counted according to the Board's own precedents. See, e.g., *Conso Fastener Corp.*, 120 NLRB 532, 535 (1958).

In sum, Respondent submits that there is not substantial evidence in the record to support a finding that the Union represented a majority of Respondent's employees on January 15, 1965. At least three of the applications, Eugenia Wanner's, Neal's, and Jochheim's, should have been excluded by the Board.

If the Union did not represent a majority of Respondent's employees in a combined mechanical department unit, the Board's finding of a Section 8(a)(5) violation was erroneous, and a bargaining order was improper. Accordingly, that portion of the Board's order should not be enforced. *J. P. Stevens & Co. v. NLRB*, 380 F.2d 292 (2d Cir. 1967); *NLRB v. H. W. Elson Bottling Co.*, 379 F.2d 223 (6th Cir. 1967).

II.

NONE OF THE BOARD'S FINDINGS AS TO RESPONDENT'S UNLAWFUL COURSE OF CONDUCT BETWEEN THE TIME OF THE UNION'S DEMAND AND THE ELECTION, UPON WHICH THE BOARD RELIED TO FIND THAT RESPONDENT VIOLATED SECTION 8(a)(5), ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Respondent Was Entitled To A Finding Of Good Faith Doubt As To The Appropriateness Of The Unit Requested By The Union.

In its Brief, Petitioner states that "the alleged doubt concerning the unit is equally demonstrative of the Company's bad faith. The Company *first* questioned the unit almost a month after the Union's demand. . . ." (Brief, p. 33) (Emphasis added)

The record is clearly to the contrary. In Braden's initial reply of January 20 to the Union's January 15 demand, he wrote that the Union ought to seek certification by the Board "in an appropriate collective bargaining unit." (G. C. Exh. 2) The Trial Examiner made no reference to Braden's testimony that, prior to sending that letter, he had discussed his doubts about the appropriateness of a combined mechanical department unit with counsel and had been advised that such unit was not normal.* (Tr. 33, 325) Nor did he refer to the letter which the Union, on February 4, sent in reply to Braden's letter. The following excerpt from the reply makes it clear that the *Union* understood the January 20 letter as raising a doubt as to the appropriateness of the suggested unit:

"As to the question of a bargaining unit, the Union will include. . . ." (G. C. Exh. 3) (Emphasis added)

The Trial Examiner made *no* finding as to whether or not Respondent had a good faith doubt as to the appropriateness of the unit *as of the time* it received the Union's bargaining request. He simply concluded that "*whatever* doubt Respondent may have had as to the appropriateness of any unit suggested by the Union, did

* As of January 20, then current Board precedents made it clear that an all mechanical department unit combining composing room employees with pressmen or other printing crafts was normally *not* an appropriate unit. See, e.g., *Dinuba Sentinel*, 137 NLRB 1610 (1962). Even in *Garden Island Publishing Co.*, 154 NLRB 697, 698 (1965) which issued six months *after* Braden's reply letter, the Board restated its long standing position that "in the mechanical department of a newspaper, the Board usually finds appropriate separate units of the various crafts," the exception being when neither union nor employer *objects* to a joinder of traditionally separate crafts.

not relieve it of its obligation to bargain with the Union.” (R. 26) (Emphasis added)*

It is Respondent’s contention that it did have a good faith doubt as to the appropriateness of the requested unit, that it communicated this doubt to the Union on January 20, and that such doubt ought to be considered by this Court along with the other factors hereinafter discussed in determining whether or not there is substantial evidence in the record to support a finding that Respondent did not in good faith refuse to recognize and bargain with the Union.**

B. There Is No Substantial Evidence To Support The Finding That Respondent’s Employee Interviews Violated Section 8(a)(1).

The Board determined that the interviews which Braden conducted following receipt of the Union’s telegram of January 15 were coercive or reasonably had a tendency to coerce his employees. This finding not only provided a basis for the Board’s conclusion that Respondent had thereby violated Section 8(a)(1), but it was also

* He also stated that since Respondent *later* agreed with the Union in the Agreement For Consent Election that a combined unit was appropriate, Respondent must be held to have waived its objection to such a unit. (R. 19) This later position by Respondent has no bearing on whether or not Respondent could doubt the appropriateness of the requested unit on January 20.

**This Court has recognized implicitly that a good faith doubt regarding composition of bargaining units *does* justify a refusal to bargain where that doubt affects the question of whether or not the Union has achieved majority status. *Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902, 908 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965). Respondent’s doubt regarding the unit was clearly relevant to the majority question since, as will be developed *infra*, it had been informed by a majority of the employees in the composing room, the traditional unit, that they did not wish to be represented by the Union.

used in a unique manner to controvert Respondent's claim that its refusal to bargain was based on a good faith doubt as to the majority status of the Union. The Board adopted the Trial Examiner's finding that Respondent was *estopped* from relying on the answers which the employees gave during the interviews because of the coercive nature of the interviews. (R. 31 n. 29)

If the Court agrees with Respondent that these interviews were lawful, then, of course, Respondent was entitled to rely on such information. In *Briggs IGA Foodliner*, 146 NLRB 443, 446 (1964), the Board held that an employer's interviewing of his employees soon after a union demand was not a violation of the Act. The Board went on to hold that the information acquired by such interviews helped *create* a good faith doubt that the union represented a majority. Respondent submits that the interviews in question were not improper and that the reasoning which led the Board and the Trial Examiner to a contrary conclusion was erroneous.

The Trial Examiner advanced five reasons in support of his determination that the interviews violated Section 8(a)(1): (1) the interviews were not conducted for a "legitimate" purpose since Respondent had already replied to the Union that it doubted whether the Union represented a majority in an appropriate unit; (2) the interviews were formal; (3) Braden demonstrated an anti-Union animus to employees prior to and during the interviews; (4) Braden held out the promise of possible pay raises to several employees during the interviews; and (5) two of the employees lied when asked if they had signed Union cards.

1. The Board Erred In Finding That The Interviews Were Conducted For An Illegal Purpose

The Trial Examiner made *no* finding as to what he considered the purpose of Braden's interviews with his employees to be. What he did state was that since the interviews were to "confirm the doubt" that Respondent had expressed in its letter to the Union, they were not conducted for a legitimate purpose and did not fall under the Board's *Blue Flash** doctrine.** (R. 28)

In *Blue Flash*, the Board held that an employer's individual interviews of employees to determine whether or not they had signed union cards did not violate Section 8(a)(1) of the Act. The Board's rationale was that this interrogation was not coercive in light of the fact that prior to each interview the employer informed his employees that he had received a bargaining demand from the union, that they were not required to answer his questions, that no reprisals would follow if they did, and that his communicated purpose was to determine whether the majority claimed by the union did, in fact, exist. The Trial Examiner conceded that Braden had complied with these *Blue Flash* requirements. (R. 28-29)***

* *Blue Flash Express, Inc.*, 109 NLRB 591 (1954)

**The three cases relied upon by the Trial Examiner and Petitioner (Brief, pp. 13-14 n. 13) are not in point. In each of them, *P-M Parking System*, 139 NLRB 987 (1962), *Henry I. Siegel Co., Inc.*, 143 NLRB 386 (1963), *enforced*, 328 F.2d 25 (2d Cir. 1964), and *General Electric Co.*, 143 NLRB 926 (1963), there was clear proof of a typical *illegal* purpose for interrogation. For instance, in *Henry I. Siegel Co., Inc.*, employees were quizzed as to the identity of the union ringleader. In none of these three cases did an employer, after utilizing the *Blue Flash* safeguards, *infra*, interrogate employees for the purpose of determining or confirming whether or not a majority had designated a union as collective bargaining representative.

***Braden either showed or told each of the employees whom he interviewed of the Union's demand of January 15 and that he wanted to find out if it was correct. He told them that they did not have to answer and, if they did, they did not have to fear any reprisals.

It is clear that the Trial Examiner's finding that the interviews were not for a legitimate purpose rested on their *timing*, in that they did not occur until after Respondent's first reply letter of January 20.

However, absent proof of an illegal purpose, the fact that Respondent deemed it prudent to confirm an initial expression of doubt should not taint such interviews. An employer should have no less a valid interest in confirming an already stated doubt of majority status than in interrogating to determine whether he can in the first instance fairly claim such a doubt.

Respondent's prudence in this regard proved sound, for in the Union's next letter of February 4 (G. C. Exh. 3), the Union offered for the *first time* to prove its claim of majority status. In its reply of February 11, Respondent told the Union about the interviews and that its rejection of the Union's offer of proof was based on those interviews. (G. C. Exh. 4) Had the results of the interviews been otherwise, Respondent would have been in a position to agree with the Union's claim.

Respondent, therefore, submits that the conclusion of coercion, because of either the lack of purpose* or timing** of the interviews, was erroneous.

* This Court has repeatedly held that interrogation *per se* is not unlawful. See, *e.g.*, *NLRB v. Sellers*, 346 F.2d 625 (9th Cir. 1965); *Salinas Valley Broadcasting Corp. v. NLRB*, 334 F.2d 604 (9th Cir. 1964); *S. H. Kress & Co. v. NLRB*, 317 F.2d 225 (9th Cir. 1963); *NLRB v. Fullerton Publishing Co.*, 283 F.2d 545 (9th Cir. 1960); *NLRB v. McCatron*, 216 F.2d 212 (9th Cir. 1954) *cert. denied*, 348 U.S. 943 (1955); *Wayside Press v. NLRB*, 206 F.2d 862 (9th Cir. 1953).

**A delay in polling employees is not objectionable as far as the Board is concerned. In *Cameo Lingerie, Inc.*, 148 NLRB 535 (1964), notwithstanding the Board's assumption that the union had represented a majority *at the time of its original demand*, the Board refused to find an 8(a)(5) violation even though the employer did not poll his employee until *three months* after such demand was made.

2. The Board Erred In Finding That The Interviews Were Conducted With Coercive Formality.

The Trial Examiner's conclusion that "in *each* instance, the employee was summoned to Braden's office by his foreman" (R. 15, 28) (Emphasis added) is contrary to the record. (See, *e.g.*, Tr. 44.) The more significant fact, however, is that the record is lacking in any evidence which would support, or even suggest, that talking with Braden in his office was, to the employees, a "formal" procedure. On the contrary, the record clearly demonstrates that Braden had a close relationship with most of his employees. (Tr. 52, 53, 346)*

The Trial Examiner reasoned that the very fact that Braden otherwise enjoyed an informal relationship with his employees rendered the procedure followed during the interviews coercive. (R. 28) Respondent submits that this reasoning has no basis either in the record or in logic and therefore the finding of "coercive formality" was erroneous.

3. The Board Erred In Finding That Braden's Statements Reflected An Anti-Union Animus And In Relying On Such Statements To Find That The Interviews Were Coercive.

The Trial Examiner found that "even before the interviews, Braden has (*sic*) already made clear to the employees at the group meeting his opposition to the Union, and this was reiterated in some of the interviews. . . ." (R. 28)

The record discloses that there were at least two meetings, one before the interviews and one at the time of Respondent's filing its RM Petition in March. Several

* As stated by Braden, "[T]he door was always open, they could all come in. . . ." (Tr. 347)

of the Braden statements relied upon by the Trial Examiner actually occurred at the latter meeting. However, it is Respondent's position that these statements, regardless of when they were made, were protected speech within the meaning of Section 8(c) of the Act.

Insofar as the pre-interview meeting was concerned, the Trial Examiner relied on the testimony of Bowman, Wanner and Salani. Bowman recalled a meeting attended by about a dozen employees and his entire testimony describing what Braden said was as follows:

"A He just said *he didn't care if anyone was union or not*. He wanted — that he hated to see it come into the shop.

"Q Did he make any further comment at that time?

"A Not that I can remember."

(Tr. 43) (Emphasis added) (See also Tr. 50)

Salani testified similarly. (Tr. 269)

Wanner's testimony was as follows:

"A Well, Mr. Braden said that he had received a telegram or a letter from the union stating that they felt — or that they had a majority of the people in the composing room and press room, and that they felt they should represent them for negotiating for a union contract, as I recall.

"Q Did he express *his view* as to desirability of the union being recognized?

"A He felt that the Blade-Tribune would be better off without the union." (Tr. 190, 191) (Emphasis added)

The Trial Examiner did not mention the following testimony by employee Hareld:

“... but I think he did say — *it is entirely up to you — up to us — whichever way we want to go.*” (Tr. 216) (Emphasis added)

The meeting described by witness Messinger, whose testimony was relied upon by the Trial Examiner to help support a conclusion that the interviews were conducted in an atmosphere of coercion, actually occurred *after* the interviews, at or about the time Respondent filed its RM Petition in March:

“Q (Mr. White) Is it your testimony that at some occasion Mr. Braden called the employees together and told them that he had filed a petition with the Board for an election?

“A Yes.

“Q Was that the meeting you were talking about in explaining it to [General Counsel]?

“A Yes, sir, it was. That was the meeting there that I was talking about. That was when they were all there at the meeting. That was when they were all there that he had petitioned the union for an election.

“Q The petition to the National Labor Relations Board?

“A Yes.” (Tr. 136, 137)

What Mr. Braden stated at that meeting was described by Messinger as follows:

“A It started out — first of all, he gave us his version and his idea of why an employer should run his own business and that — and the subject was brought up of why there was so many — in fact, I brought the subject up myself of why there was so many different skills in one plant, and Mr. Braden

made the statement that the longer the man had been there and had been with him more years, he should draw more money than a new man, and which isn't true in the plant, but that was his answer to me.

"And also he gave us the idea that he wasn't in favor of the union, but he was going to allow us to vote to decide *which way we wanted to go on it*.

"Q Did he say the employees were free to vote on the union in any way they desired?

"A I couldn't say with truth about that. I couldn't say with truth if he made that statement or not.

"Q You heard him make that statement; did you not?

"A I believe — I believe *he did make the statement that the employees could vote whichever way they wanted to vote.*" (Tr. 137, 138) (Emphasis added)

It would also appear that the meeting referred to by Agneta, and upon which the Trial Examiner relied to help support his conclusion that the interviews were conducted in an atmosphere of coercion, was the same *later* meeting described by Messinger. (Tr. 153) In any event, the statements attributed to Mr. Braden at such meeting were as follows:

"Q (General Counsel) Did Mr. Braden express his views as to the matter at that time?

"A Yes, he did.

"Q What did he say?

"A Well, he said that he felt that it was a family, and everybody was happy, and we — he was always happy working with the employees, and that we didn't need a union in the shop.

“The shop runs fine, he said, that he believed in free enterprise. He explained this a little bit, and he felt that he could run the newspaper better than the union could run it. I am not sure of the specific words, but he did say that he could run the shop better the way he had been running it for years with the close-knit family of people, and that everybody would progress along with the paper, which is progressive.” (Tr. 154)

Based on the foregoing, Respondent submits that General Counsel failed to prove that the interviews with the employees were coercive in character because of any pre-interview statements attributed to Braden.* It is true that Braden stated his personal preference toward operating his business as he saw fit, but at all times he made clear to his employees his respect for their statutory rights under Section 7 of the Act. In this regard, the foregoing testimony of the various employee witnesses was corroborated by Braden. (Tr. 33, 36, 37)

Section 8(c) of the Act provides that “the expressing of any views, argument or opinion, or the dissemination

* Insofar as the “reiteration” of Braden’s “opposition to the Union” *during* the interviews is concerned, the Trial Examiner relied on three statements: first, a statement to Agneta about “dragging people over to the Miramar,” which will be discussed *infra*; a question to David Wanner about a “kick . . . in the teeth” before Wanner left; and a statement to Harrington that Braden did not think that the paper needed a union at the time. The question to Wanner occurred after Wanner’s statement that he had only joined the Union because he was going to quit shortly and go to Alaska where he understood he had to be in the Union to get a job and that “it was a coincidence, my joining the union and going to Alaska, and the shop being organized.” (Tr. 192)

The statement to Harrington, Respondent submits, is a privileged statement of opinion within Section 8(c). Even if it were not, the foregoing statements do not constitute sufficient evidence that all the interviews with thirteen employees were coercive because of Braden’s “anti-Union animus.”

thereof, whether in written, printed, graphic or visual form, *shall not constitute or be evidence of* an unfair labor practice under any of the provisions of this sub-chapter, if such expression contains no threat of reprisal or force or promise of benefit." (Emphasis added)

Respondent submits that the pre-interview statements attributed to Braden, all of which are set forth above, were clearly within the free speech proviso of this section and were improperly relied upon to characterize the employee interviews as coercive and violative of Section 8(a)(1).

Respondent suggests that several circuits have circumvented the clear language of Section 8(c) by reasoning that, while protected employer speech cannot be considered "evidence" of an unfair labor practice, such speech may be considered as "background" in finding the existence of anti-union animus. See *International Union, United A., A. & A. Imp. Wkrs. v. NLRB*, 363 F.2d 702, 707 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 973 (1966); *Hendrix Mfg. Co. v. NLRB*, 321 F.2d 100 (5th Cir. 1963); *Flemingsburg Mfg. Co. v. NLRB*, 300 F.2d 182 (6th Cir. 1962). This dubious distinction between "evidence" and "background" information was rejected in *NLRB v. Colvert Dairy Products Co.*, 317 F.2d 44 (10th Cir. 1963), and in *NLRB v. Howard Quarries, Inc.*, 362 F.2d 236 (8th Cir. 1966). In the latter case, the Court of Appeals held that "mere display of anti-union hostility during the course of an organizational campaign is to be expected and does not constitute an unfair labor practice." (362 F.2d at 240) Moreover, the Court held that an employer's speech which does not constitute an unfair labor practice cannot be considered as evidence of another unfair labor practice:

“The right of free speech guaranteed by the First Amendment and by § 8(c) should not be defeated by narrow or strained construction.” (362 F.2d at 240)

This Court has not passed squarely upon this issue, but Respondent reads *NLRB v. Roberts Brothers*, 225 F.2d 58, 60 (9th Cir. 1955), as an indication that this Court will adopt the rule announced in *Colvert Dairy Products, supra*. In *Roberts Brothers*, General Counsel argued that the fact that a concededly privileged speech had been made just before the taking of a private poll rendered the poll coercive because of its subtle psychological effect on the employees. This Court rejected the argument and refused to consider the speech in denying the petition for enforcement of a cease and desist order.

4. The Board Erred In Finding That The Interviews Were Coercive Because Of Remarks To Bowman And Harrington Concerning Pay Raises.

Employee Bowman testified that within a week or two after his interview with Braden, which would have been sometime in February, he received a twenty-cent raise. (Tr. 45)

Employee Harrington testified that he received a fifteen-cent raise shortly after his interview with Braden, which also would have been in February. (Tr. 58)

Contrary to Petitioner's assertion that there was no “independent evidence” as to Respondent's pay raise policy, Respondent submits that the record clearly shows that the foregoing raises were granted in conformity with a theretofore consistently followed practice of granting raises in the press-stereo department, in which Bowman and Harrington were employed, at six-month intervals. This practice was described by Braden (Tr. 334) and it was corroborated by both Bowman and Har-

rington. (Tr. 52, 63, 64) Harrington testified that he and the other press room employees had received their last raises “around August” of 1964, which was about six months prior to the February, 1965, raises. (Tr. 63) He further stated that the other employees in his department received the February raise at the same time that he did. (Tr. 59, 60) There was no evidence as to the amounts of such other raises or how they compared with Bowman’s or Harrington’s.

There was no finding, much less a contention made, that the *granting* of the pay raises violated the Act.*

The foregoing evidence was not acknowledged in the decision of the Trial Examiner, who simply found support for his finding of promises of benefit in the fact that Braden had told Harrington and Bowman that there might be some problem in granting the periodic raises, but that he would see what he could do. (Tr. 44, 65, 77)** These statements to Bowman and Harrington during the interviews were made because Braden was uncertain whether he could give the raises in light of the Union situation.*** He later consulted his attorney

* The Board has consistently refused to find that the granting of wage increases in conformity with established past practice during an organizational campaign constitutes a violation of the Act. *Sheboygan Sausage Co., Inc.*, 156 NLRB 1490 (1966); *Higgins Industries, Inc.*, 150 NLRB 106 (1964); *Phillips Mfg. Co.*, 148 NLRB 1420 (1964); *Charlotte Union Bus Station, Inc.*, 135 NLRB 228 (1962).

Conversely, the *withholding* of customary wage increases has been held to constitute an “inherently coercive” unfair labor practice. *Federation of Union Representatives v. NLRB*, 339 F.2d 126, 129-130 (2d Cir. 1964).

**There is nothing in the record which suggests the granting of raises was conditioned on employees’ staying away from the Union or voting against the Union in a future election. Furthermore, at the time the raises were granted they were not accompanied by any reference to the Union. (Tr. 45)

***That Braden’s concern was not unfounded is manifest from the Trial Examiner’s decision.

on the matter, and was advised that, because of past practice, the granting of the usual raises should be all right. (Tr. 335)

Respondent emphasizes that the Board did not find that the references to or actual granting of the raises to Bowman or Harrington were violative of Section 8(a)(1). Respondent therefore submits that the innocuous references by Braden to pay raises were erroneously relied upon as a factor to support a finding that the interviews were coercive.

5. The Board Erred In Finding That Two Employees Lied During The Interviews, Or, In Any Event, That The Interviews Were Thereby Rendered Coercive.

The Trial Examiner found that the coercive nature of the interviews was demonstrated by the fact that Harrington and Agneta replied in the negative when asked by Braden whether they had signed Union cards, although both had signed applications. The inference drawn from that finding was that these employees were afraid to admit the truth.

Insofar as Harrington is concerned, when he was asked whether he had signed a card, he responded in the negative, not because of fear, but because he had *not* signed a *card*:

“A . . . and he asked me if I had signed a card saying anything to do with them, and I said no, I hadn’t signed a card.

“Q Had you signed a card?

“A *No. I signed a piece of paper.*

“Q It was another form? It was an application form, in letter form?

“A Not necessarily letter form.

“Q It was a large printed application form?

“A Yes.” (Tr. 57) (Emphasis added) (See also, Tr. 62 and G. C. Exh. 9)

Agneta’s credited testimony that he had denied signing a Union card (Tr. 162) was contradicted by Braden. (Tr. 331) Respondent submits that the denial was completely inconsistent with Agneta’s answer to a previous question:

“Q In the course of this conversation with Mr. Braden on this individual interview, apart from the statement which you have described, was there any direct inquiry made of you — directly concerning your affiliation with the union?

“I mean, on the part of Mr. Braden?

“Did Mr. Braden make such an inquiry of you?

“A Why, *I don’t think it was necessary before the conversation was over. He pretty much knew.*” (Tr. 162) (Emphasis added)

Furthermore, Respondent submits that Agneta’s denial was inherently unbelievable, inasmuch as it followed testimony concerning his “extensive” recitation to Braden of all his “reasons for wanting the shop to become a union shop.” (Tr. 156-162). If Agneta had in fact denied signing a Union authorization card, it certainly would have been to Braden’s advantage to *confirm* such denial, inasmuch as this would have further bolstered his claim of a good faith doubt as to the existence of the Union’s claimed majority.

In any event, even if the findings that Harrington and Agneta had lied during the interviews were supported by the record, that factor would not necessitate a determination that the interviews were coercive. See, *e.g.*,

Bon-R Reproductions, Inc. v. NLRB, 309 F.2d 898 (2d Cir. 1962)*; *NLRB v. Firedoor Corp. of America*, 291 F.2d 328 (2d Cir. 1961).

6. Assuming Arguendo That One Interview Violated Section 8(a)(1), Such Finding Would Not Be A Sufficient Basis Upon Which to Conclude That All The Other Interviews Were Unlawful.

At the time the interviews condemned by the Trial Examiner were conducted, the Board required, in order to uphold the validity of such interviews, that the employer "communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis. . . ." *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965). The Board conceded that Braden conducted the interviews in accordance with those requirements.

Respondent submits that it is only with respect to the interview of employee Agneta that the record may be said to contain any substantial evidence of coercion.**

* In *Bon-R Reproductions, Inc. v. NLRB*, the Court held that the interrogations did not constitute an unfair labor practice despite the fact that the interviews were conducted by the president in his office, at least one employee lied during the interrogation, and colorably coercive remarks were made in at least one interrogation. The Court emphasized that, as in the instant case, there had been no threats or promises of benefits made during the short interrogation and that the employees had been told the purpose of the interrogations and that no reprisals would follow.

**The cases cited by Petitioner in support of its contention that inquiries as to union sympathy are necessarily coercive (Brief, p. 12) are clearly distinguishable. *NLRB v. West Coast Casket Co.*, 205 F.2d 902 (9th Cir. 1953), involved interviews which were *not* conducted in accordance with *Blue Flash* requirements. *NLRB v. Essex Wire Corp.*, 245 F.2d 589 (9th Cir. 1957) and *NLRB v. California Compress Company*, 274 F.2d 104 (9th Cir. 1959), neither of which presented a situation in which employee interviews were conducted, are patently inapplicable.

Even Agneta admitted, however, that Braden had advised him prior to the interview that he did not have to answer any questions that were asked (Tr. 182) and that he did not have to fear any reprisal if he did answer any questions. (Tr. 182)

Agneta confirmed that he spent a great part of the interview (Tr. 158, 331) volunteering grievances to Braden. (Tr. 156, 157-162) Agneta apparently attempted to taint the interview by attributing to Braden several questions or statements which would suggest that Braden acted unlawfully. Thus, in one instance, Agneta testified that Braden asked him about "dragging people over to the Miramar with the union men that was there. . . ." (Tr. 156) His recollection of such inquiry was admittedly uncertain. (Tr. 156) Furthermore, on cross-examination, Agneta blunted any implication that such remarks may have raised by stating specifically that Braden did *not* ask him about any other employee. (Tr. 182)

The record discloses that what began as an interview of Agneta became an extended grievance session with an admitted Union sympathizer. Agneta presented to Braden his views as to the benefits expected from unionization and he was subject to no restraints on or circumscription of his freedom of expression. Respondent submits that the very fact that Agneta was obviously *not* intimidated may provide sufficient basis for overturning the Trial Examiner's conclusion that the particular interview was coercive. See *NLRB v. Prince Macaroni Mfg. Co.*, 329 F.2d 803, 806 (1st Cir. 1964).

In any event, even if the Agneta interview did involve a violation of Section 8(a)(1), it is clear from the record that that interview was not representative of any of the other employee interviews. Therefore, it should not serve as the basis for even a cease and desist order, much less as a predicate for a finding that Respondent in bad faith

declined to recognize the Union. *Milwaukee Electric Tool Corp.*, 110 NLRB 977, 980 (1954); *Gazette Publishing Co.*, 101 NLRB 1694, 1731 (1952).

C. The Board Erred In Finding That Although Respondent May Have Had Reason To Believe That A Majority Of His Employees Had Not Designated The Union As Collective Bargaining Representative, Respondent Was Not Entitled To Rely On Such Information.

The Board held that Respondent was not entitled to rely on the answers which the employees gave during the interviews because of the coercive nature of Braden's interrogation.

If the Court agrees with Respondent that there is not substantial evidence to prove that such interviews were unlawful, then of course Respondent *is* entitled to rely on such information. *Briggs IGA Foodliner, supra*.

Braden testified that at the time of the interviews, he had considered that there were about 22 employees working in the mechanical departments, 18 in the composing room and 4 in the press-stereo department. (Tr. p. 326) Of these 22, Braden had reason to believe that 12 employees [Wells (Tr. 331), Hareld (Tr. 220, 331), Messinger (Tr. 139, 141, 333), Metzger (Tr. 332), Neal (Tr. 262, 332), Salani (Tr. 269, 332), David Wanner (Tr. 192, 198, 332), Wetzel (Tr. 332-333), Wilson (Tr. 333), Schultz (Tr. 333), Harrington (Tr. 62, 333), and Eugenia Wanner (Tr. 213, 333)], or 11, if Wells is excluded,* either had not designated the Union to represent them or did not want the Union to represent them. Of these 11 or 12, all but 2 — Schultz and Harrington — were composing room em-

* Wells' status was an issue before the Trial Examiner, who concluded that he was a supervisor.

ployees. Based on these interviews, Respondent had reason to believe that 9 or 10 composing room employees and 2 press-stereo department employees did not wish to be represented by the Union.

D. There Is No Substantial Evidence To Support The Finding That Changing Agneta's Work Schedule Violated Section 8(a)(1).

Respondent contended vigorously before the Board and still contends that it was error to allow an amendment to the Complaint herein on December 14, 1965, over Respondent's objection, which amendment alleged unlawful conduct toward employee Agneta during April, 1965. The original charge contained similar allegations involving Agneta and they had previously been withdrawn by the Union. (Tr. 130) However, Respondent's objection that such amendment was barred by the six-month statute of limitations contained in Section 10(b) of the Act was overruled and Respondent had no practical choice except to litigate the amendment. (Tr. 132)*

However, even if evidence in support of the amendment was properly received, it was not sufficient to support the conclusion that Respondent's action in altering Agneta's work schedule violated Section 8(a)(1).

The Trial Examiner credited testimony of employee Messinger that Wells, Respondent's foreman, had told him that he was going to "get rid of Agneta" after the election, and that Wells later showed him a work schedule and said that "he was sure Agneta wouldn't stay there

* *NLRB v. Osbrink*, 218 F.2d 341, 345 (9th Cir. 1954), cited by Petitioner at p. 20 of its Brief, did not involve a situation where a charge, once withdrawn, was subsequently revived by amending a complaint. *Frito Co. v. NLRB*, 330 F.2d 458 (9th Cir. 1964), also cited, involved an amendment to conform to proof, where the proof had been admitted *without* objection.

after he saw the schedule.” (Tr. 129, 130) Wells had denied such statements. (Tr. 316)

The Trial Examiner concluded that Respondent had a two-fold motive toward Agneta: to rid itself of a Union supporter and to set an example for other employees. (R. 31) However, there is no evidence in the record which tends to prove that Wells knew or ought to have known of Agneta’s Union sympathies.* Even according to Messinger’s credited version, Wells did not say he was going to get rid of Agneta *because* Agneta was a Union adherent, nor did Wells otherwise refer to the Union.** As the Court has stated:

“An unlawful intent is not lightly to be inferred. It cannot rest on remote or speculative evidence.” *Salinas Valley Broadcasting Corp. v. NLRB*, 334 F.2d 604, 613 (9th Cir. 1964).

On the contrary, it is clear that Wells considered Agneta to be an unsatisfactory employee. (Tr. 142, 299)

Prior to the schedule change, which affected a number of employees *other* than just Agneta, Agneta had been

* Petitioner’s characterization of Agneta as “the Union’s leading supporter,” at p. 37 of its Brief, is completely lacking of support in the record.

**At p. 18 of its Brief, Petitioner cites *NLRB v. Globe Products Corp.*, 322 F.2d 694, 696 (4th Cir. 1963), and *NLRB v. Ferguson*, 257 F.2d 88, 92 (5th Cir. 1958), as authority for Wells’ statement being an “outright confession” of unlawful conduct. The utterances in those cases clearly demonstrated a casual relationship to Union activity. *Ferguson*: “Well, . . . I understand that Mr. Ferguson fired everybody that signed a union card . . . he was letting everybody go that had signed a union card. . . . I believe I told you and everybody I hired that Mr. Ferguson didn’t go for the union . . . and that before he would go union he would close the gate and lock the trucks up and . . . go somewhere else and start over.” (257 F.2d at 91) *Globe Products*: “I am afraid I am going to have to let you two go, because we don’t like the idea of our employees fooling around with the union. . . . We are going to make examples of you. . . .” (322 F.2d at 695)

working a night shift (3 P.M. to 11 P.M.) on Monday, Tuesday, Wednesday, Friday and Saturday. (Tr. 314) After the change, Agneta's schedule was the day shift (7 A.M. to 3 P.M.) on Monday, Wednesday and Friday, the night shift on Thursday (3 P.M. to 11 P.M.), and a short shift from 10 A.M. on Saturday. (G. C. Exh. 20; Tr. 169, 170) The alleged oppressiveness of the schedule lay in the fact that on Thursday evening each week, Agneta would not leave work until 11 P.M. and would have to return for work at 7 A.M. the following Friday morning. (Tr. 144, 172) This type of shift is known in the newspaper industry as "doubling back." (Tr. 309)

The reasons for the change were explained by Wells:

"A In the case of the operators, it was a new man coming on.

"Q Who was that?

"A That would be Vincent Diedel, so it was more of the placing, rather than a change, to have him on a shift.

"Q All right.

"A In the case of Ray Craig, again, we were gaining a new man, a new operator on Saturday, so his Saturday was changed—his shift on Saturday—slightly to cover the work flow on that day a little better.

"Ed Agneta—let's see . . . Also, there was another new employee at that time, Lou Calpini.

"Q Is that the same person that is known as Sylvio Calpini?

"A Sylvio L. Calpini.

"I placed him on nights, and brought Agneta over to a day shift, *as much as possible*, so Agneta could

work with Paul Jones to see if we *couldn't make a printer out of him.*" (Tr. 313) (Emphasis added)

Before the change was actually made, Wells explained to Agneta that one of the reasons for the new schedule was to permit Agneta to work as much as possible with Paul Jones, an experienced journeyman compositor. (Tr. 315, 316) This was admitted by Agneta, (Tr. 168) and Jones confirmed that Wells had explained to him, also, the reason for the change in Agneta's schedule. (Tr. 299) Jones concurred in Wells' opinion that Agneta was only an "apprentice" printer, (Tr. 307) and even *Messinger* admitted having heard Wells express this opinion. (Tr. 142)

In light of the fact that Agneta actually worked only *one* "doubling back" shift before he quit, (Tr. 166, 167, 315) his claim of physical exhaustion was inherently incredible:

"— you can't work in these hours every day, and definitely wake up and go to bed, and you — consequently, I missed a lot of sleep.

"Q You found yourself unusually drowsy?

"A Tired on the job, and on two occasions, had a small piece of cast pop out of my fingers when trimming them on the saw, which scared me." (Tr. 171, 172)

"Q Did the increased hazard have anything to do with quitting when you did?

"A Yes, it had quite a bit do with it, except that I didn't quite specifically quit.

"I wasn't specifically fired. *I just could not show up to work. . . .*" (Tr. 172) (Emphasis added)

The Trial Examiner, however, apparently placed considerable reliance on Jones' testimony that a "doubling back" schedule was not "particularly helpful in the training of an apprentice." (R. 30) This, however, was irrelevant. Respondent has never contended that "doubling back" is itself a useful training experience. It was simply an unavoidable result of Respondent's efforts to enable Agneta to work under Jones' supervision "as much as possible." (Tr. 313)

In *NLRB v. Isis Plumbing & Heating Co.*, 322 F.2d 913, 922 (9th Cir. 1963), this Court declared that:

"The entire record must be viewed in context with the established principle of law that an employer may discharge an employee for good cause, or bad cause, or no cause at all, unless the real motivating purpose is to do that which . . . the Act forbids."

Respondent urges that the record, considered as a whole, compels the determination that the change in Agneta's work schedule was occasioned by Respondent's desire to accommodate several new and experienced employees, as well as to have Agneta work as much as possible with an experienced journeyman.

E. There Is No Substantial Evidence To Support The Finding That Respondent's Pre-Election Luncheon Meetings With Employees Violated Section 8(a)(1).

The Trial Examiner found that Braden's action in taking most of Respondent's employees to lunch prior to the election constituted a violation of Section 8(a)(1) of the Act which in turn provided evidence of Braden's lack of good faith in refusing to recognize the Union. The Trial Examiner conceded (R. 30) that these luncheons, in

and of themselves, were *in no way objectionable*.^{*} The objectionable aspects which he found were “Braden’s admitted questioning of the employees as to ‘what they thought of the Union,’ coupled with his reference to Bowman of a pay raise and his statement to David Wanner and Metzger of a possible pension plan, *particularly when considered in the light of Respondent’s other unfair labor practices*. . . .” (R. 30) (Emphasis added)

The lack of substantial evidence to support the “other unfair labor practices” has already been discussed. The other objectionable factors set forth above are equally deficient in their support in the record.

First, insofar as “questioning” of employees is concerned, the record shows the following: Braden testified that, after consulting with counsel, he decided to express his opinions and views concerning the forthcoming election at a series of luncheon meetings with his employees. (Tr. 344, 345)

* That Braden did campaign against the Union prior to the election in no way detracts from his claim of a good faith doubt that the Union at the time of its demand represented a majority of his employees. An employer might well have a bona fide doubt that the Union has achieved majority status at the time of the demand and at the same time, believe that the development of a majority is sufficiently possible that a campaign prior to the election is required. There should certainly be a distinction between efforts to dissipate an existing Union majority and a pre-election campaign to prevent the aggregation of a *possible* Union majority. The United States Court of Appeals for the Seventh Circuit has recognized that pre-election campaigning is not inconsistent with a good faith doubt as to a union’s majority status:

“ . . . [i]t is not possible to draw from this the sole inference that [the employer] had no good faith doubt of the union’s majority. It is equally inferable that [the employer] was simply concerned and did not like the union organizational drive, perhaps fearing the development of a union majority.”

Wausau Steel Corp. v. NLRB, 377 F.2d 369, 372 (7th Cir. 1967).

“I have lunched with people from the Blade-Tribune before and since, and I have had coffee breaks with them, but coffee breaks are more difficult and shorter, and when I am in town for an hour or so for lunch, it seemed the reasonable way to do it, and so I determined that my campaign to express my point of view, was to ask individual employees to go to lunch with me.

“I did this over a period of a couple of weeks asking sometimes one, and sometimes two or three, I think on one occasion four employees to go to lunch with me, at the Miramar, and during the course of these lunches, I talked with them about the forthcoming election, and I expressed what my opinions were.” (Tr. 345)

“... I also asked them or nearly always asked them if they thought that there were good reasons why we ought to join the union, and expressed to them my point of view.

“I want to listen, and maybe they could give me some good argument. Some of them did.” (Tr. 347)

Five other witnesses testified about the luncheons: Bowman stated that, during the luncheon to which he was invited, Braden “never said a word” about the Union. (Tr. 47) David Wanner testified that he and Metzger were invited to lunch and that the only question asked of them by Braden was “our opinion as to the outcome of the election, how it will turn out.” (Tr. 194) Wanner further testified that Braden did not ask any questions about individual employees nor about how any individual employee might vote. (Tr. 198) Eugenia Wanner testified that she and another employee were invited to lunch and that during the course of the luncheon Braden asked them “how we thought the outcome was going to be in the election.” (Tr. 211) She also testified that Braden did not

ask any questions about individual employees. (Tr. 214) Hareld testified that he volunteered to Braden that the election would be close, (Tr. 220) but that Braden never asked any questions about any other employees. (Tr. 221) Salani testified that, at the luncheon which he attended, the only question which Braden asked was "What is going on?" (Tr. 273) Salani assumed that Braden was referring to the Union, and he volunteered a personal opinion. (Tr. 271, 272, 273)

The record reveals, therefore, that at some luncheons the Union was not mentioned at all. Obviously, no unlawful interrogation was established as to these.

At most of the luncheons, Braden simply presented his views and opinions about the forthcoming election. There was no evidence contradicting Braden's testimony in this regard and such expressions of opinion should be held to be clearly within the purview of Section 8(c).

During a few luncheons Braden asked employees how they thought the election would go, but in no case did he inquire how they or any other employees would vote.

In several instances, although no employee so testified, Braden admittedly asked employees whether "there were

good reasons why we ought to join the union. . . ." (Tr. 347) *

There is no evidence that these casual and perfunctory inquiries by Braden were pursued in any way or were made for any purpose other than as general conversation.

There is no evidence that Braden used the luncheons in order to conduct a "systematic inquiry and effort to ascertain the extent to which employees in the unit were disclosing support for the Union, and had membership therein," as had been charged in Paragraph 12 of the Complaint herein. [G. C. Exh. 1(c)] **

* The Board has heretofore approved inquiries strikingly similar to those made by Braden, and has held them to be not in violation of Section 8(a)(1). In *Augusta Bedding Co.*, 93 NLRB 211 (1951), the employer's question, "What good [are you] going to get out of the Union?" was held to be an argumentative question which indicated the employer's views and was therefore protected by the free speech provisions of Section 8(c). 93 NLRB at 220-221.

In *Milwaukee Electric Tool Corp.*, 110 NLRB 977, 980 (1954), the Board held that an employer's questioning of employees as to whether they personally thought a union was needed and if they thought other employees needed a union was merely argumentative, and not violative of Section 8(a)(1).

In *Lanthier Machine Works*, 116 NLRB 1029, 1037 (1956), the Board approved a finding that a supervisor's inquiry of an employee as to "how the Union was going" was not violative of Section 8(a)(1), but was rather a casual and perfunctory inquiry.

**Taken as a whole, the inquiries occurring during the luncheon meetings were as unobjectionable as those upheld by the Board in *Howard Aero, Inc.*, 119 NLRB 1531, 1533-1534 (1958):

"As for the conversations between (two employees) and their supervisors, the only interrogation was the question to (employee A) by (his supervisor) as to what (such employee) thought of the Union. In substance, the conversations between (the other supervisor) and (employee B) were merely *discussions over the pros and cons of unionism, and cannot be construed as interrogation.* . . .

Insofar as the “reference to Bowman of a pay raise” is concerned, Bowman testified as follows:

“Q (General Counsel) At this time what statements did (Mr. Braden) make concerning the union or the forthcoming election?

“A He never said a word.

“Q Did he, at that time, make reference to the wage increase that you would receive?

“A Not that I remember.” (Tr. 46, 47)

“Q (Counsel for Intervenor) Did he make any reference directly or indirectly with regard to the increase you would receive?

“MR. WHITE: Objection. The question has been asked and answered.

“MR. WILLIAMS: Not with reference to this scope.

“TRIAL EXAMINER: Do you mean with regard to this luncheon?

“MR. WILLIAMS: Yes.

“TRIAL EXAMINER: He was asked if anything was said about the union or election at the luncheon, and he answered in the negative.

“Do you want to know if there were any references made directly or indirectly about the increase of wages?”

“. . . the question directed to (employee A) merely called for an *opinion about the Union*; . . . In these circumstances, we find that these questions did not reasonably tend to restrain or interfere with employees in the exercise of their rights under the Act, and that the Respondent did not violate the Act thereby.” 119 NLRB at 1533-1534. (Emphasis and parentheticals added.)

“MR. WILLIAMS: Yes.

“TRIAL EXAMINER: All right. I will permit that.

“Do you remember the question?

“THE WITNESS: Yes. Yes, there was.”* (Tr. 49) (Emphasis added)

The latter vague answer to a vague and ambiguous question (which was seemingly contradictory to an earlier answer given to General Counsel) constitutes the “substantial evidence” upon which a finding of an unlawful reference to a pay raise was made.

The third objectionable feature associated with *all* of the luncheon meetings was a reference — at *one* luncheon with *two* employees — concerning a pension plan. Respondent offers for the Court’s review the entire record relating to this finding:

“Q (General Counsel) Did he make reference to a pension plan?

“A (David Wanner) He made reference to either a pension plan or an insurance plan.

“Q What was said in that respect?

“A He said that he thought that it would be possible in the future for the employees of the Blade-Tribune — I believe he stated — to work out a pension plan.

“Q Did he compare that with any other plan? Specifically, did he make reference to the ITU pension plan?

“A Not specifically no. I believe he said, as good as they have got, or something” (Tr. 194, 195)

* It will be recalled that Bowman received a raise in February.

“ . . .

“Q (Mr. White) This question of pension or insurance plan, do you recall how that subject first came up, or how it — who brought it up?

“A (David Wanner) No, I don’t.

“Q Did Mr. Metzger first bring that up?

“A *He could have.*

“Q In that conversation, . . . did he say, as best you can recall, whether or not there might be one in the future, *depending on how the election came out?*

“A I don’t believe so.” (Tr. 198, 199)

“ . . .

“Q (General Counsel) As best as you recall, what was his reference to the pension plan? How did he explain himself with respect to this plan, at that luncheon meeting?

“A He had nothing specific, nothing definite about it. He seemed to be open minded favorably toward it.

“Q This is not in response to my question. You say that he provided no specific detail of the plan, but what did he say might be done about such a plan, as you recall?

“A Well, he didn’t — his statement, or his comment on this did not go into the implimenting [sic] of a plan, or a plan in itself. It was that we might in the near future work up a pension plan.” (Tr. 199)

The foregoing reference by Braden to a pension plan was obviously casual and vague. There was certainly no

promise and no conditioning of the implementation of a plan on the outcome of the election.

In sum, it is manifestly clear from the foregoing review of evidence that General Counsel did not sustain his burden of proving that, by its conduct during the pre-election luncheons, Respondent violated Section 8(a)(1) of the Act and the Board's findings of fact with respect to the illegality of the luncheon meetings are not supported by substantial evidence.

III.

THE BOARD'S BARGAINING REMEDY SHOULD NOT BE ENFORCED SINCE THE RECORD FAILS TO REVEAL A COURSE OF CONDUCT INVOLVING SUBSTANTIAL UNFAIR LABOR PRACTICES CALCULATED TO DISSIPATE UNION SUPPORT OR WHICH MANIFESTS AN EARLIER REFUSAL TO RECOGNIZE THE UNION.

The major premise of the Trial Examiner's and Board's conclusion that Respondent had violated Section 8(a)(5) was the determination that Respondent had committed other unfair labor practices — the alleged 8(a)(1) violations — which "began immediately after the Union's request for recognition and continued until 2 days before the election." (R. 31-32)

As Respondent has demonstrated, the record as a whole does not contain substantial evidence to support such a conclusion.

Petitioner, of course, asserts that the Board's determinations must remain unmolested because they were within the Board's competence as the "primary finder of fact."

That the frail fabric woven by the Trial Examiner and accepted by the Board can be characterized as a finding of

fact ought not to be, in itself, sufficient to compel the upholding thereof. Nor is such a result dictated by any limitations imposed upon this Court's scope of review by Section 10(e) of the Act. As stated in *Joy Silk Mills v. NLRB*:*

“What [Section 10(e)] was intended to do was insure that in the fringe or borderline case, where the evidence affords but a tenuous foundation for the Board's findings, the Court of Appeals would scrutinize the entire record with care, and be at liberty, where there is not ‘substantial evidence,’ to modify or set aside the Board's findings.”

Assuming *arguendo* that this Court should conclude that Respondent violated Section 8(a)(1) with respect to Agneta or at some point during the luncheon meetings, such violations would not be of the character or degree necessary to support a determination that Respondent had earlier refused to bargain in good faith or engaged in an unlawful campaign to dissipate Union support.

The mere fact that there have been underlying 8(a)(1) violations does not permit a “mechanical finding of intent to dissipate a union's majority.” *NLRB v. Mid-West Towel & Linen Service, Inc.*, 339 F.2d 958, 963 (7th Cir. 1964). See also, *Montgomery Ward & Co. v. NLRB*, 377 F.2d 452 (6th Cir. 1967); *Edward Fields, Inc. v. NLRB*, 325 F.2d 754 (2d Cir. 1963).

Respondent urges this Court to consider what the Board itself has stated about the relationship between 8(a)(1) violations and resultant findings of an unlawful refusal to bargain. In *Aaron Brothers Co. of California*, 158 NLRB 1077, 1079 (1966) the Board declared:

* 185 F.2d 732, 738 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

“Whether an employer is acting in good or bad faith in questioning the union’s majority is a determination which of necessity must be made in the light of all the relevant facts of the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct. Where a company has engaged in substantial unfair labor practices calculated to dissipate union support, the Board, with the courts’ approval, has concluded that employer insistence on an election was not motivated by a good-faith doubt of the union’s majority, but rather by a rejection of the collective-bargaining principle or by a desire to gain time within which to undermine the union. However, *this does not mean that any employer conduct found violative of Section 8(a)(1) of the Act, regardless of its nature or gravity, will necessarily support a refusal-to-bargain finding.* For instance, where an employer’s unfair labor practices are not of such a character as to reflect a purpose to evade an obligation to bargain, the Board will not draw an inference of bad faith.” (Footnotes omitted) (Emphasis added)

On November 1, 1967, in *National Cash Register Co.*, 167 NLRB No. 153 (1967), the Board reemphasized what it had earlier said in *Aaron Brothers*:

“The Board’s test for determining good-faith doubt of a union’s majority is whether the employer has engaged in *substantial* unfair labor practices

calculated to dissipate union support.” (Slip opinion, p. 2) (Emphasis added)*

The evidence regarding Respondent’s conduct is certainly not such as to lead to no other conclusion but that Respondent’s refusal to recognize the Union was based upon its rejection of the principle of collective bargaining or upon its desire for time within which to undermine the Union.

On the contrary, the record reveals the following facts which militate directly against such a conclusion:

1. At the time of the Union’s demand, Respondent had and expressed a good faith doubt as to the appropriateness of the bargaining unit requested by the Union.

2. Respondent was advised by a majority of its employees that they had not authorized the Union or did not

* The following are representative of instances in which the Board has held that proof of 8(a)(1) violations did not suffice to support a finding of an 8(a)(5) refusal to bargain: *Strydel Inc.*, 156 NLRB 1185 (1966) [employer violated 8(a)(1) by threatening to impose layoffs and more onerous working conditions in the event of union organization]; *Harvard Coated Products Co.*, 156 NLRB 162 (1965) [employer violated 8(a)(1) by threatening loss of business if union came in and by promising an employee a supervisory position if the union lost the election]; *Clermont’s, Inc.*, 154 NLRB 1397 (1965) [employer coerced employees in violation of 8(a)(1) via speeches, statements and surveillance]; *Hammond & Irving, Inc.*, 154 NLRB 1071 (1965) [employer unlawfully questioned employees and actually requested some of them to vote against union in election, thereby violating 8(a)(1)]; *Cameo Lingerie, Inc.*, 148 NLRB 535 (1964) [employer violated 8(a)(1) by threatening reprisals against employees if they selected the union as bargaining representative].

want the Union to represent them. This fact was not controverted.*

3. From the outset, Respondent urged the Union to seek an election and it advised the Union that it was willing to enter into a consent election agreement.

4. Respondent filed a representation petition after the Union had failed to do so, and thereafter entered into an Agreement for Consent Election.

5. Respondent consistently advised its employees that whether or not they wanted the Union to represent them was a matter for their decision.

In sum, there is not substantial evidence on the record as a whole to support a finding that Respondent was guilty of the kind of deliberate, egregious conduct which evidences a bad faith refusal to bargain. Isolated or minimal 8(a)(1) violations fall short of demonstrating such a course of conduct in violation of Section 8(a)(5) and are therefore insufficient to support a bargaining order. *Edward Fields, Inc. v. NLRB*, *supra*, 325 F.2d 754 (2d Cir. 1963); *NLRB v. Dan River Mills, Inc.*, *supra*, 274 F.2d 381 (5th Cir. 1960).

* Even under its *own* findings, the Board seems to have ignored the *narrowness* of the Union's majority. This has not gone unnoticed in the courts, however.

In rejecting a claim that an employer had no good faith doubt of the existence of a majority, the United States Court of Appeals for the Sixth Circuit made the following observation:

"Even if the 30 signed authorization cards had been submitted to him, he might well have entertained a good faith doubt as to the validity of a sufficient number of the cards to constitute a majority, *especially in the light of the slender majority ultimately found by the Board.*" *Pizza Products Corp. v. NLRB*, 369 F.2d 431, 438 (6th Cir. 1966) (Emphasis added).

See also, *NLRB v. Dan River Mills, Inc.*, 274 F.2d 381 386 (5th Cir. 1960).

CONCLUSION

On the basis of the foregoing, enforcement of the Board's order against Respondent should be denied.

Respectfully submitted,

O'MELVENY & MYERS

RICHARD C. WHITE

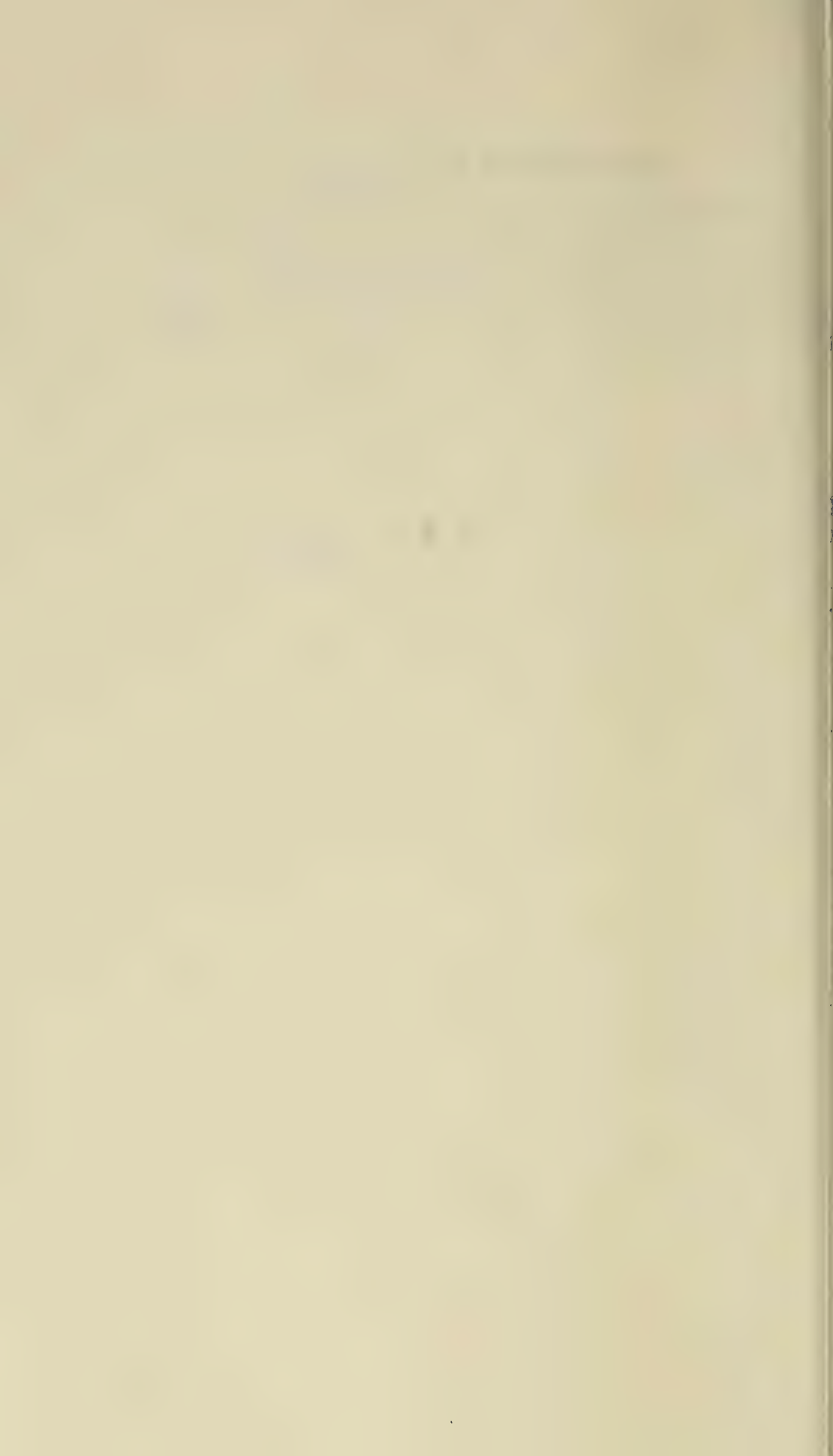
DAVID A. MARION

Attorneys for Respondent

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with these rules.

DAVID A. MARION



Docket No. 21,865

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PERSON MEADOWS, INCORPORATED,

Appellant,

vs.

TEL MAURICE CORPORATION,
al,

Appellees.

From

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Bruce R. Thompson, Judge

APPELLANT'S BRIEF

FILED

FEB 6 1968

WM. B. LUCK, CLERK

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Docket No. 21,865

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re the Petition for a Chapter X
Reorganization of Carson Meadows,
Incorporated, Debtor.

From

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Bruce R. Thompson, Judge

PETITION FOR REVIEW

Richard C. Minor
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ADDENDUM

JURISDICTIONAL STATEMENT

In accordance with Rule 18. 2 (b), the following statement is submitted setting forth the jurisdiction of the United States Court of Appeals for the Ninth Circuit to review and pass upon the merits of the order in question.

This matter originated with the filing of a petition in the United States District Court for the District of Nevada for voluntary corporate reorganization under Chapter X of the Bankruptcy Act of the United States of America.

Title 11, U. S. C., Sec. 1 (10) "Courts of Bankruptcy" shall include the United States District Courts.

Title 11, U. S. C., Sec. 1 (3) "Appellate Courts" shall include the United States Courts of Appeals and the Supreme Court of the United States.

Title 11, U. S. C., Sec. 2 (9) gives courts of bankruptcy the power to confirm or reject arrangements or plans proposed under the Act.

Title 11, U. S. C., Sec. 47 (a) says the United States Courts of Appeals . . . are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy. . .

Title 11, U. S. C., Sec. 47 (b) Such appellate jurisdiction shall be exercised by appeal in the form and manner of an appeal.

In the Bankruptcy Act, Chapter X (11 U. S. C., Sections 501 to 676) provides for corporate reorganizations, and this was the procedure under which the debtor-appellant instituted the proceedings herein.

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B. The reasoning in support of the order of dismissal is contrary to the intent of the Act	14
Proposition IV: The Special Master mis- interpreted the evidence concerning Finding of Fact Number 6	14
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ONCLUSION	15

STATEMENT OF FACTS

Debtor-appellant filed a petition for reorganization under Chapter X of the Bankruptcy Code of the United State of America in the District Court for the District of Nevada.

The District Judge appointed a Special Master to hold a hearing and take testimony concerning the debtor's petition, said hearing being held on December 1, 1966 in Reno, Nevada.

The Special Master then made his report to the District Judge recommending dismissal of the debtor's petition. Objections to the Report of the Special Master were filed. The District Judge then made an order dismissing the petition. Debtor-appellant then lodged this appeal.

SUMMARY OF ARGUMENT

The decision of the District Court should be reversed because:

Proposition No. I

The Report of the Special Master is totally defective in that it fails to contain a finding of fact as to the good faith filing of the petition.

Proposition No. II

The Report of the Special Master is totally defective in that the conclusions stated therein are not supported by the law.

STATEMENT OF FACTS

Debtor-appellant filed a petition for reorganization under Chapter X of the Bankruptcy Code of the United States of America in the District Court for the District of Nevada.

The District Judge appointed a Special Master to hold a hearing and take testimony concerning the debtor's petition, said hearing being held on December 1, 1966, in Reno, Nevada.

The Special Master then made his report to the District Judge recommending dismissal of the debtor's petition. Objections to the Report of the Special Master were filed. The District Judge then made an order dismissing the petition. Debtor-appellant then lodged this appeal.

SUMMARY OF ARGUMENT

The decision of the District Court should be reversed because:

PROPOSITION NO. I

The Report of the Special Master is fatally defective in that it fails to contain a finding of facts as to the good faith filing of the petition.

PROPOSITION NO. II

The Report of the Special Master is fatally defective in that the conclusions stated therein are not supported by the law.

PROPOSITION NO. III

The District Judge erred in ordering the petition dismissed.

A. The findings are not supported by the law.

B. The reasoning in support of the order of dismissal is contrary to the intent of the Act.

PROPOSITION NO. IV

The Special Master misinterpreted the evidence concerning Finding of Fact Number 6.

PROPOSITION NO. V

The Special Master misinterpreted the evidence concerning Finding of Fact Number 7.

ARGUMENT

LET IT PLEASE THE COURT:

Proposition I

THE REPORT OF THE SPECIAL MASTER IS FATALLY DEFECTIVE IN THAT IT FAILS TO CONTAIN A FINDING OF FACT AS TO THE GOOD FAITH FILING OF THE PETITION.

The basic question to be answered here is whether or not the Report of the Special Master herein is fatally defective because of the failure of the Special Master to make a Finding of Fact as to whether the appellant's petition for reorganization under Chapter X was filed by the debtor (appellant) in good faith.

Appellant relies heavily upon Section 541, Title 11, United States Code, which provides:

"Upon the filing of a petition by a debtor, the judge shall enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith, or dismissing it if not so satisfied."

In the instant case, the District Judge referred the petition of the debtor (appellant) to a Special Master, so that a hearing could be had and report made to the District Judge on the Findings of Fact of the Special Master. The hearing before the Special Master occurred on December 1, 1966, and a copy of the transcript is contained in the record on this appeal.

Subsequently, a Report of the Special Master was filed on March 2, 1967, a copy of which is also contained in the record on this appeal. On page one (1) of this report, lines 20-24, the Special Master indicates that he has a duty to determine if good faith did in fact exist in the filing of this petition, as he was required to do under 11 U. S. C., Sec. 541, *supra*. In fact, the report findings contained on pages 2 and 3 are silent as to the question of good faith. No finding of fact was made by the Special Master as to whether or not good faith did exist, thereby rendering the report complete and defective. Is this a fatal defect?

The District Judge, in his order of dismissal of the petition, states the purposes in referring the matter to a Special Master for a hearing is to see if the tests of good faith exist when compared to Section 546 (Order Dismissing Petition, page 2, lines 29-32), and if it can reasonably be expected that a plan of reorganization can be effected (page lines 1-2). The District Judge then states in lines 14-16 of page 3 that the Report of the Special Master and the accompanying evidence fail to show good faith on the petitioner's (debtor-appellant's) part. This is the fatal error upon which the appellant herein contends was made. The Judge claims that petitions are referred to masters to determine if good faith exists and if a plan can be put into effect. The Master says in his report that he is bound by law to determine if good faith does exist. The Master then fails to make a finding, and in fact did not specifically determine at the December 1, 1966, hearing if 11 U. S. C., Sec. 546 (1-4) existed or

ot; then the Judge, armed with no evidence but any good intentions, dismisses the petition as not having been filed in good faith "based upon the findings of the Master and the other accompanying evidence". This clearly is contrary to the law and error, and this proceeding should be remanded to the District Court to have the Report of the Special Master supplemented so far as a finding of fact concerning good faith, thereby making the report complete and adequate as required by law.

Proposition II

THE REPORT OF THE SPECIAL MASTER IS FATALLY DEFECTIVE IN THAT THE CONCLUSIONS STATED THEREIN ARE NOT SUPPORTED BY THE LAW.

The question herein presented is whether not the Report of the Special Master, on file herein, is defective for the failure of the Findings of Fact stated therein to be supported by the law.

The reorganization proceeding under Chapter X is one in which the petitioner seeks relief by means of rehabilitation. Broadly speaking, a plan is nothing more than a scheme or method for the financial readjustment of the debtor corporation. Unlike a petition under Chapters I through VII dealing with ordinary bankruptcy, a Chapter X petition does not seek the adjudication of the debtor as a bankrupt. Nor may his petition at the outset contemplate the liquidation and subsequent distribution of the debtor's estate. The aim or reorganization is to preserve, if possible, the going concern values of the debtor's business, to scale down the claims of creditors and others, to provide for the development of a plan by the terms of which the debtor, its creditors and stockholders, will receive fair and equitable treatment, and to enable the debtor to go forward on a sound financial footing. If this proves impossible of accomplishment, then the reorganization proceeding may be terminated, and,

der certain circumstances, an adjudicated entered
d bankruptcy proceeded with. All this does not
an, however, that a plan of reorganization may
t properly provide for ultimate liquidation as the
ly fair, equitable and feasible method of reor-
nizing the debtor. But it must be emphasized
at Congress did not intend that a Chapter X case
turned into a liquidation proceeding at the very
ginning, and a petition disclosing such a situa-
n must be dismissed as not filed in "good faith".
Collier on Bankruptcy, Vol. 6, pages 763-765, Sec.
03, and cases cited thereunder.

In the instant case we submit that the
debtor has made a showing that the appraised value
its real estate exceeds the obligations. In many
urts it is the practice of the court to approve the
petition summarily, even without hearings, in order
enable the debtor to have a reasonable chance of
habilitation. In fact the Statute (Secs. 140, 137
d 144) contemplates that the creditors may attack
e good faith in the filing of the petition at hear-
gs which follow the approval of the petition.
rsuant to Section 141 of the Act, the judge need
ly be "satisfied" that the petition has met the
isdictional requirements and was filed in good
th in order to approve it ex parte.

In the case of York v. Florida Southern
Corp., 310 F. 2d. 109, it was held that a determin-
on that the corporation's property was worth
bstantially more than the mortgages was not
early erroneous under the evidence, and in view
this determination a holding that a voluntary pe-
tion for corporate reorganization was filed in good
th was not clearly erroneous and the petition
uld not be dismissed even though it appeared
tremely unlikely, in light of the position of the
rtgage holders that they would not consent to any
organization plan, that plan could be effected.
is situation is almost fair square with the situa-
n in the instant case, but to make the instant
se even stronger, not all of the mortgagees have

indicated an unwillingness to consent to a proper reorganization plan. In York, it was further held that the fact, standing alone, that a class of secured creditors announces that it will not agree to a corporate reorganization plan does not make it possible for a reorganization petition to be filed in good faith under the Bankruptcy Act.

In Fidelity Assurance Assoc. v. Sims, 318 U.S. 87, 87 L. Ed. 1032, it is indicated that there is no requirement under the Act for an immediate plan and that the debtor should have a reasonable time to work out and present a plan. Then, if no plan can be approved, an orderly liquidation can be had under the Chapter X proceeding which would be for the benefit, not only of the creditors, but of the corporation and the stockholders, and it is further indicated that no dismissal is necessary.

Based on the testimony before the Special Master (Transcript, page 20, line 17 through page 21, line 1) the debtor has indicated a willingness to liquidate such of the assets as are necessary to pay all creditors including the mortgage holders with the hope of being able to continue in business after the creditors have been satisfied.

In a straight bankruptcy proceeding as distinguished from one in reorganization, a secured creditor holding a mortgage and/or assignment of rents may take certain steps to sequester the rents. The courts take into consideration such factors as (1) the nature of the mortgage transaction under the applicable state law; (2) the terms of the mortgage itself; (3) the acts of the parties thereunder; and (4) whether equitable considerations applied by the Federal Bankruptcy Court may alter the result. Generally, the mortgagee must take affirmative steps to maintain the rent either before or after bankruptcy. Collier on Bankruptcy, 14th Ed., Sec. 70.16(7), page 1044.

In a reorganization proceeding where the success or failure of a debtor may be vital to a successful

organization, the secured creditor claims must be viewed from a different perspective; he may be affected to the extent that the nature of his security can be converted to an equitable equivalent as opposed to a straight liquidation where he is entitled to look to his security as such. Consequently, the treatment of rent and profits in a reorganization proceeding may be different than in a straight bankruptcy.

Generally, rents, profits or income accruing from the debtor's property may be dealt with on the same basis as the property itself. 6 Collier, 14th Ed., Sec. 14.03(1), p. 5015. The reorganization court may demand possession from a prior receiver, trustee, agent, mortgagee or indenture trustee in possession and at the same time secure the rents and profits or income which have already accrued and have been collected and held. A fortiori, the court may refuse to sequester or turn over to a secured creditor rents and profits from the security where the creditor is not in possession at the time the reorganization or superceded bankruptcy began.

"The court's power is consonant with the purposes of a reorganization proceeding, as stated in the text at the beginning of this discussion* and is not unconstitutional. The secured creditor must yield to the exigencies of reorganization. But here also the exercise of the court's power is discretionary."
6 Collier on Bankruptcy, 14th Ed., Sec. 14.03, p. 5016.

Moreover, as has been stated many times, the reorganization proceedings seek to maintain the status quo of the debtor corporation pending a reasonable opportunity to rehabilitate and overhaul the debtor's financial structure, and to this end secured as well as unsecured claimants may not only be

strained, but their claims may be dealt with and effected by the reorganization plan. 6 Collier, 11th Ed., Sec. 14.03 (1), p. 5008.

In this connection, a preliminary inquiry should be made as to the existence of a valid assignment as security; there may only be an equitable assignment; the mortgagor may be an agent to collect for the mortgagee; there may be a contract to pay an indebtedness out of a fund or proceeds of certain assets; or there may be a mere arrangement to pay a debt already owing. In re Clarke Realty Co., 234 Fed. 576 (C.A. 9, 1916); In re Realty Associates Securities Corp., 98 F. 2d. 722 (C.A. 9, 1938); State Control Savings Bank v. Hemoy, 77 F. 2d. 458 (C.A. 8, 1935).

Where rents and profits are ordered turned over, they do not constitute general assets thereby distributable to junior creditors and stockholders in impairment of the secured creditor's prior rights, but they may at least be used for the current operating expenses of the debtor's business. 6 Collier, 11th Ed. Sec. 14.03(1), p. 5017.

In In re Franklin Garden Apartments, Inc., 14 F. 2d. 451 (C.A. 2, 1941), a voluntary Chapter 11 petition was approved and a trustee appointed. The debtor was engaged in the business of owning and operating real property and improvements thereon. One such property was a 123 unit apartment building subject to a mortgage and assignment of rents in the event of default. Also, the debtor executed a separate instrument assigning to the mortgagee the rents then due and thereafter to become due; also, the debtor appointed the mortgagee as agent to collect the rents; the mortgagee went into possession, collected the rents and paid various operating expenses.

Subsequently, the Chapter X was filed and the trustee sought possession of the premises and the use of the rents to complete the building by

installing a water sprinkler. The court decreed that the trustee gain possession and the right to collect rents subsequent to the filing of the Chapter X petition and enjoined the mortgagee from interfering therewith, and required an accounting of rents collected since the filing; also it authorized the procurement of a sprinkler system, furniture and furnishings, etc., as necessary to complete the building. The order authorized payment from the rentals "all expenses of administration of this proceeding and, after the foregoing payments, to turn over the net balance of all rents to the mortgagee".

The Court of Appeals held that Sections 246 and 257 of Chapter X fully warranted awarding possession to the trustee.

As to the using of the rents to complete the building, the court found that to allow this at the present time (the proceeding had just begun and the equity in the building might be "elusive") would be unfair and an inadequate protection for the mortgagee's rights, especially since it is not certain that there will be any plan approved and the mortgaged premises may not be sold pursuant to Sec. 236 or the Chapter X proceedings may not be dismissed.

As to the use of the rentals for expenses, they may be applied toward "current operating expenses but should not be used to pay expenses of administration".

". . . While such expenses may hereafter be paid from rentals or other sources by virtue of Sections 241, 246 or 259 of the Chandler Act, 11 U.S.C.A. Secs. 641, 647, 659, there seems no justification for allowing them at the present time, or indeed for allowing them at any time, out of the security belonging to the mortgagee except insofar as the mortgaged property has received

benefit through the proceeding
(Randolph v. Scruggs, 190 U.S.
533, 23 S.Ct. 710, 47 L. Ed.
1165; In re Centralia Refining Co.,
D.C. Ill., 35 F. Supp. 599, 602),
or the mortgagee's rights are fully
secured.

"Since the decision in Continental
Illinois Nat. Bank & Trust Co. v.
Chicago, Rock Island & P. Ry. Co.,
294 U.S. 643, 675, 55 S.Ct. 595,
79 L. Ed. 1110, we have no doubt of
the power of the district court to
take possession of the mortgaged
premises, collect the rents and en-
join the mortgagee from interfering
therewith. Clark Bros. Co. v.
Portex Oil Co., 9 Cir., 113 F.2d.
45, 47. We cannot know what fur-
ther may be done until the submis-
sion of a plan of reorganization or
the failure to achieve one. It is
possible that one may be proposed
which will leave a sufficient equity
to justify the application of rental
receipts to expenses of the pro-
ceeding and to the completion of
building and procurement of equip-
ment. It may leave the mortgagee
in a better position than at present
and not meet with any objection."
p. 454

In a supplemental memorandum, the court
stated that the mortgagee no longer objected to the
use of rents to complete the building and that a
plan had been adopted which did not require use of
the rents to pay administrative expenses.

In Central Hanover Bank & Trust Co. v.
Philadelphia & Reading Coal & Iron Co., 99 F. 2d.
42 (C.A. 3, 1938), a 77B proceeding, a trustee

under a mortgage covering almost all of the debtor's property securing a bond issue sought to have the income sequestered and impounded to protect the bondholder's title to the income. The petition was denied and the mortgage trustee appealed.

The court noted the rehabilitative nature of reorganization wherein the status quo is maintained while the debtor continues its operation as a going concern. "The sequestration of substantially all of the debtor's current income would undoubtedly impede its operation as a going concern as to render well nigh impossible its reorganization as such." (p. 645)

As to the status of the income in the hands of the trustee, the situation is analogous to a bankruptcy proceeding, where the right of the mortgagee to the income "attaches only to the net income remaining after payment of proper administrative expenses, operating expenses and taxes," as allowed by the bankruptcy court. The court thus affirmed the lower court's denial of the petition to sequester and impound the income from the property.

In another appeal in the same case, In re Philadelphia & Reading Coal & Iron Co., 117 F. 2d. 976 (C.A. 3, 1941), the mortgage trustee sought to sequester and impound the dividends paid on certain stock which the debtor owned and which had been pledged under the mortgage securing the debtor's bonds. The court refused to do so on the basis of its prior decision. No constitutional rights are violated.

". . . On the contrary the right of the mortgage trustee ultimately to receive the income of the mortgaged and pledged property, to the extent necessary to satisfy the claims of the bondholders, became fixed on February 26, 1937, the day the

petition for reorganization was approved by the court, and was thereafter subject only to the payment of the proper expenses of the operation of the debtor's business and the administration of its estate and to the terms of the plan of reorganization when and if approved and confirmed by the court. The custody of the income in the interim is obviously a matter of remedy and not of right since it was in any event subject to necessary operating and administrative expenses." p. 978

The argument was made that the debtor doesn't need the income to continue operating. The court noted that the rule refusing sequestration is founded upon the necessities involved in the continuing operation of the debtor as a going concern and when the necessities cease to exist, the rule would cease to be applicable. The district court took the proper view in saying "It would of course be possible to modify the original order, if it were made to appear that this particular income was not needed by the debtor to carry on its business operations, but that has not been shown to be the fact and, from what this court knows of the debtor's situation, in all probability could not be." (p. 979)

Consequently, a mortgagee under a mortgage containing a right to collect rents and/or an assignee of rents as security for a debt may be ordered to turn over the property and rents collected subsequent to the filing of a petition under Chapter 11 or the date of a superceded bankruptcy petition; likewise, such a creditor will not be allowed to sequester and impound rents collected by a trustee where the trustee or debtor in possession remains in possession. The rent in the hands of the

reorganization trustee may be used to pay current operating expenses and perhaps even administrative expenses. It may be paid out to the mortgagee during the pending reorganization if in the court's discretion it is determined that the income is not and will not be needed for a successful reorganization. The rules relating to straight bankruptcy in regard to lien on encumbered property must be modified accordingly in a Chapter X reorganization proceeding.

As to the Special Master's statement in finding of Fact No. 7 "that Debtor's cash-flow income from rentals and other sources is insufficient to meet past incurred, as well as current obligations with respect to its secured creditors", the debtor submits that the Special Master's conception of the purposes of a Chapter X proceeding is not in accordance with the law; and to follow the Master's line of thinking to his recommendation that the proceedings be dismissed would not only be completely ignoring the purposes as set forth above of a Chapter X proceeding but would be flying in the face of the cases therein cited.

Proposition III

THE DISTRICT JUDGE ERRED IN
ORDERING THE PETITION DIS-
MISSED.

A. The findings are not supported by the
law.

The District Judge, in his Order of Dismissal, lines 14-16, page 3, summarily disregards the evidence which substantiates debtor's petition that his assets exceed his liabilities, and the evidence that one of the mortgagees did in fact indicate a willingness to withhold action against the debtor until the debtor has had an opportunity to rehabilitate itself. The Judge seems displeased (lines 24-26, page 3) that it was not adduced whether or not the debtor's (appellant's) income currently was

sufficient to defray his current expenses. It seems that none of the creditors care, and that the Special Master was negligent in his duty if he failed to determine this important fact. The fact remains enough that the District Judge, pursuant to 11 U. S. C., Sec. 141, need only be "satisfied" that the petition has met the jurisdictional requirements and was filed in good faith by the debtor in order to approve it.

B. The reasoning in support of the Order of Dismissal is contrary to the intent of the Act.

The main purpose of Chapter X proceedings is to allow a debtor a period of time to pay his creditors according to a proposed plan. It is to benefit all, not to injure the parties concerned. In the instant situation, the debtor's assets are valued at an amount greatly in excess of his liabilities, but to cause them to be sold at a forced sale would greatly diminish the amount the debtor would receive for them. All the debtor-appellant asks for herein is a chance to regain a financial foothold so he can pay his just obligations. This is what the Act intended, but the Judge in his order has denied even giving the debtor a chance. He has not even let the debtor propose a plan to be considered. Clearly, this is not what the Act was initiated for, and the debtor should be given the chance to propose a plan to be considered by the creditors.

Proposition IV

THE SPECIAL MASTER MISINTERPRETED THE EVIDENCE CONCERNING FINDING OF FACT NUMBER 6.

Appellant contends that Finding of Fact Number 6 is based upon a misinterpretation of the testimony taken before the Special Master on December 1, 1966. In this regard, it appears that very limited testimony concerning the attempts of the debtor-appellant to obtain financing has been taken,

and that a narrow interpretation has been placed upon such testimony. The testimony has apparently been interpreted and assumed to apply to the entire corporate structure, whereas, in reality, the testimony (Transcript, page 25, lines 15-22) specifically sets out that the various financial statements made by debtor were so given specifically in connection with a certain project, not the entire corporate outlook.

Proposition V

THE SPECIAL MASTER MISINTERPRETED THE EVIDENCE CONCERNING FINDING OF FACT NUMBER 7.

Appellant contends that Finding of Fact Number 7 is based upon a misinterpretation of the testimony taken before the Special Master on December 1, 1966. The conclusion by the Master is based upon a mere statement of Mr. Goldbeck, which is merely a possible suggested alternative. No actual definite plan has been formulated and submitted to the court or the Special Master at this time.

Based upon the decision in Fidelity Assurance Association v. Sims, 318 U. S. 608, 87 L. Ed. 132, no plan was required to have been submitted at this early date. In the Fidelity Assurance case, the court recognized that the Act did not require any definite plan to be submitted immediately, but indicated instead that the debtor should be given a reasonable time to formulate and submit his plan to the court, making sure that he has carefully considered all the aspects and phases to be covered and all the conditions concerning it.

CONCLUSION

For the above reasons, which briefly stated are:

1. The Special Master's Report is incomplete for failure to contain any Finding of Fact concerning good faith;

2. The Special Master's conclusions in his report are not supported by the law;

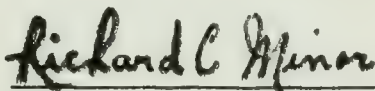
3. The order of the District Judge is in error since his conclusions are not supported by the law or the facts and are contrary to the intent of the act;

4. The Special Master misinterpreted the testimony concerning Finding of Fact Number 6;

5. The Special Master misinterpreted the testimony concerning Finding of Fact Number 7;

Debtor-appellant, CARSON MEADOWS, INC., respectfully prays that the order of the United States District Court for the District of Nevada be reversed, and that this cause be remanded to that court with instructions to hold another hearing on this matter and to gather full and adequate testimony concerning debtor's financial position, his proposed plan, and whether or not good faith does in fact exist.

Respectfully submitted,



RICHARD C. MINOR
Attorney for Debtor
140 North Virginia St.
Reno, Nevada

January 8, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 + 39 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard C Minor

Richard C. Minor, Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21866

EQUITABLE SAVINGS AND LOAN ASSOCIATION,
Petitioner,

vs.

HONORABLE PEIRSON M. HALL, JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent.

SUPPLEMENTAL APPENDIX

TO

REPLY BRIEF FOR PETITIONER

FILED

AUG 1 1967

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13 DISTRICT COURT OF THE UNITED STATES

14 SOUTHERN DISTRICT OF CALIFORNIA

15 CENTRAL DIVISION

16 EQUITABLE SAVINGS AND LOAN
17 ASSOCIATION, a California
18 corporation,

CIVIL ACTION
NO. 63-1107-P.H.

19 Plaintiff,

SUMMARY OF CERTAIN
ATTORNEYS LEGAL
SERVICES FOR WHICH
FEES ARE ASKED

20 -VS-

21 SIDNEY ELLIOTT, WINNIE BUCKLIN,
22 MABEL FERGUS, and JOHN (BEANS)
23 REARDON, individually and as the
24 Shareholders' Protective Committee
25 of Long Beach Federal Savings and Loan
26 Association, suing on behalf of all of
27 the savings shareholders of said
28 Association as a class; FEDERAL HOME
29 LOAN BANK BOARD, a sue and be sued
30 agency of the United States; FEDERAL
31 SAVINGS AND LOAN INSURANCE CORPORATION,
32 a sue and be sued Federal corporation
and agency of the United States; LONG
BEACH FEDERAL SAVINGS AND LOAN
ASSOCIATION, a Federal mutual
association; JOSEPH FIELDS, a citizen
of New York; MARION FIELDS, a citizen
of New York; RALPH FIELDS, a citizen
of New York; SAVINGS AND LOAN
COMMISSIONER OF THE STATE OF CALIFORNIA
(sued herein as John Doe 1),

Defendants.

SIDNEY ELLIOTT, WINNIE BUCKLIN
MABEL FERGUS and JOHN (BEANS) REARDON,
Individually and as the Shareholders'
Protective Committee of Long Beach
Federal Savings and Loan Association,
suing on behalf of all of the savings
shareholders of said Association as a

1 class; and LONG BEACH FEDERAL
2 SAVINGS AND LOAN ASSOCIATION, a
3 Federal mutual savings and loan
4 association,

5 Cross-Claimants,

6 -VS-

7 FEDERAL HOME LOAN BANK BOARD, a
8 sue and be sued agency of the
9 United States; FEDERAL SAVINGS
10 AND LOAN INSURANCE CORPORATION, a
11 sue and be sued Federal corporation,
12 and agency of the United States;
13 EQUITABLE SAVINGS AND LOAN
14 ASSOCIATION, a California
15 corporation; JOSEPH FIELDS, a
16 citizen of New York; MARION FIELDS,
17 a citizen of New York; RALPH FIELDS,
18 a citizen of New York; SAVINGS AND
19 LOAN COMMISSIONER OF THE STATE OF
20 CALIFORNIA (sued herein as John
21 Doe 1),

22 Cross-Defendants.

23 N. JOSEPH ROSS,

24 Intervenor.

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DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

SIDNEY ELLIOTT, WINNIE DUCKLIN,
MABEL FERGUS and JOHN (BEANS)
REARDON, individually and as
the Shareholders' Protective
Committee of Long Beach Federal
Savings and Loan Association,
suing on behalf of all of the
savings shareholders of said
Association as a class; and
LONG BEACH FEDERAL SAVINGS
AND LOAN ASSOCIATION, a
Federal mutual savings and
loan association, and EQUIPMENT
SAVINGS AND LOAN ASSOCIATION, a
California corporation,

Plaintiff,

-vs-

FEDERAL HOME LOAN BANK BOARD,
a sue and be sued agency of
the United States; FEDERAL
SAVINGS AND LOAN INSURANCE
CORPORATION, a sue and be
sued Federal corporation,
and agency of the United
States,

Defendants.

N. JOSEPH ROSS,

Intervenor.

CIVIL ACTION

No. 63-1072-P.H.

SUMMARY OF CERTAIN

ATTORNEYS' FEES

AND COSTS

IN THIS CASE

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DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

SIDNEY ELLIOTT, et al.,

Plaintiff,

-VS-

FEDERAL HOME LOAN BANK BOARD,
a sue and be sued agency of the
United States; SAVINGS AND LOAN
COMMISSIONER of The STATE OF
CALIFORNIA (sued herein as
John Doe 1); et al.,

Defendants.

LONG BEACH FEDERAL SAVINGS AND
LOAN ASSOCIATION, a Federal
Mutual Association,

Cross-Claimant,

-VS-

FEDERAL HOME LOAN BANK BOARD, a
sue and be sued agency of the
United States; SAVINGS AND LOAN
COMMISSIONER of The STATE OF
CALIFORNIA (sued herein as
John Doe 1); et al.,

Cross-Defendants.

EQUITABLE SAVINGS AND LOAN
ASSOCIATION, a California corporation,

Cross-Claimant,

-VS-

CIVIL ACTION

No. 63-1230-P.H.

SUMMARY OF CERTAIN

ATTORNEYS LEGAL

SERVICES FOR WHICH

FEES ARE ASKED

1 FEDERAL HOME LOAN BANK BOARD,
2 a suo and do sued agency of the
3 United States; SAVINGS AND LOAN
4 COMMISSIONER of THE STATE OF
5 CALIFORNIA (sued herein as
6 John Doe I); et al.,

7 Cross-Defendants.

8 N. JOSEPH JESS,

9 Intervenor.

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1 held ready for filing the same day that the merger could be,
2 completed. Preparations were made for filing simultaneously;
3 in both State and Federal Courts; and also for a third Federal
4 Court interpleader action, to follow immediately. With this
5 anchor point established, it would be possible to bring all other
6 actions, regardless of where filed or by whom, into one Federal
7 Court for overall decision.

8 This legal strategy required a multitude of conferences
9 between the counsel for Long Beach Federal, the Sharcholenski,
10 Protective Committee, Equitable, and others. At such conferences
11 the attorneys sought to agree as far as possible upon joint
12 pleadings in which several parties could join and to draft
13 pleadings so that they could be utilized in several different
14 actions by incorporation as exhibits to cross-complaints,
15 counterclaims, cross-claims, etc.

16 This necessitated many redrafts of litigation documents
17 so that all counsel joining for their respective clients, in any
18 one document or action, were satisfied in the documents in which
19 they joined.

20 Long Beach Federal's Attorney General in 1962-1963 was
21 the only remaining original counsel of those who had participated
22 in the 1946-1947 United States Supreme Court proceedings and was
23 familiar with the following 16 years of litigation. He therefore
24 undertook making the first drafts of the many litigation documents
25 required in each of the three actions, and submitted them to
26 Attorney General for the Sharcholenski Protective Committee, who
27 had been in the litigation for two years, since 1960; and to
28 Attorney General Adelson who had been Equitable's attorney for
29 about 1 1/2 years, since 1961. He also conferred with, and persuaded
30 the various other attorneys for the Long Beach Federal new savings
31 depositors, whose individual accounts were being forfeited by
32 the Bank Board, that the State and Federal Court class actions,

1 Protective Committee Attorney George W. Trammell is personally
2 familiar with the period from April 1960 to the present.

3 References to the value of \$9,500,000 placed upon the
4 791,650 shares of guaranteed stock of Equitable Savings and Loan
5 Association are based upon studies and reports by Standard Research
6 Associates, a subsidiary of Standard and Poors, nationwide stock
7 and security analysis firm. The market price, as distinguished
8 from the actual value of said 791,650 shares, has varied widely,
9 as have all other savings and loan stocks. No attempt has been
10 made to follow such fluctuations of the stock market.

11 Attorney Chapman verifies this statement as to matters
12 from May 1946 to date. Attorney Trammell verifies this statement
13 as to matters from April 1960 to date.

14
15 CHARLES K. CHAPMAN

16 CHARLES K. CHAPMAN

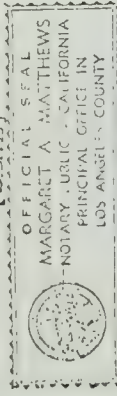
17 SUBSCRIBED and sworn to before

18 me this 1 day of June, 1965.

19 MARGARET A. MATTHEWS

20 Notary Public in and for said
County and State.

21 [SEAL]



22 My Commission Expires January 3, 1969

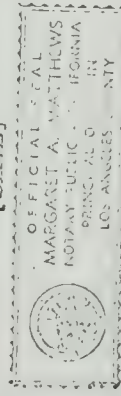
23 SUBSCRIBED and sworn to before

24 me this 28 day of MAY, 1965.

25 MARGARET A. MATTHEWS

26 Notary Public in and for said
County and State.

27 [SEAL]



28 My Commission Expires Jan. 3, 1969

29

30

31

32

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Protective Committee.

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

SIDNEY FELLIOTT, WINNIE BUCKLIN,
MABEL FERGUS and JOHN (BEANS)
REARDON, individually and as
the Shareholders' Protective
Committee of Long Beach Federal
Savings and Loan Association,
suing on behalf of all of the
savings shareholders of said
Association as a class; and
LONG BEACH FEDERAL SAVINGS
AND LOAN ASSOCIATION, a
Federal mutual savings and
loan association,

Plaintiffs,

-VS-

FEDERAL HOME LOAN BANK BOARD,
a sue and be sued agency of
the United States; FEDERAL
SAVINGS AND LOAN INSURANCE
CORPORATION, a sue and be
sued Federal corporation,
and agency of the United
States,

Defendants.

N. JOSEPH ROSS,

Intervenor.

CIVIL ACTION

No. 63-1072-P.H.

PETITION AND MOTION
FOR PARTIAL ALLOWANCE
ON ACCOUNT OF ATTORNEYS'
FEES FOR PLAINTIFFS'
AND CROSS-CLAIMANTS'
ATTORNEYS IN CLASS
ACTIONS. AND POINTS
AND AUTHORITIES.

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Attorney for plaintiffs Shareholders'
Protective Committee.

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

EQUITABLE SAVINGS AND LOAN
ASSOCIATION, a California
corporation,

Plaintiff,

--VS--

SIDNEY ELLIOTT, WINNIE BUCKLIN,
MABEL FERGUS, and JOHN (BEANS)
REARDON, Individually and as the
Shareholders' Protective Committee
of Long Beach Federal Savings and Loan
Association, suing on behalf of all of
the savings shareholders of said
Association as a class; FEDERAL HOME
LOAN BANK BOARD, a sue and be sued
agency of the United States; FEDERAL
SAVINGS AND LOAN INSURANCE CORPORATION,
a sue and be sued Federal corporation,
and agency of the United States; LONG
BEACH FEDERAL SAVINGS AND LOAN
ASSOCIATION, a Federal mutual
association; JOSEPH FIELDS, a citizen
of New York; MARION FIELDS, a citizen
of New York; RALPH FIELDS, a citizen
of New York; SAVINGS AND LOAN
COMMISSIONER OF THE STATE OF CALIFORNIA
(sued herein as John Doe 1),

Defendants.

SIDNEY ELLIOTT, WINNIE BUCKLIN,
MABEL FERGUS and JOHN (BEANS) REARDON,
Individually and as the Shareholders'
Protective Committee of Long Beach
Federal Savings and Loan Association,
suing on behalf of all of the savings
shareholders of said Association as a

CIVIL ACTION

NO. 63-1107-P.H.

PETITION AND MOTION

FOR PARTIAL ALLOWANCE

ON ACCOUNT OF ATTORNEYS'

FEES FOR PLAINTIFFS'

AND CROSS-CLAIMANTS'

ATTORNEYS IN CLASS

ACTIONS, AND POINTS

AND AUTHORITIES.

1 class; and LONG BEACH FEDERAL
2 SAVINGS AND LOAN ASSOCIATION, a
3 Federal mutual savings and loan
4 association,

5 Cross-Claimants,

6 -VS-

7 FEDERAL HOME LOAN BANK BOARD, a
8 suc and be sued agency of the
9 United States; FEDERAL SAVINGS
10 AND LOAN INSURANCE CORPORATION, a
11 suc and be sued Federal corporation,
12 and agency of the United States;
13 EQUITABLE SAVINGS AND LOAN
14 ASSOCIATION, a California
15 corporation; JOSEPH FIELDS, a
16 citizen of New York; MARION FIELDS,
17 a citizen of New York; RALPH FIELDS,
18 a citizen of New York; SAVINGS AND
19 LOAN COMMISSIONER OF THE STATE OF
20 CALIFORNIA (sued herein as John
21 Doe 1),

22 Cross-Defendants.

23 N. JOSEPH ROSS,

24 Intervenor.

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Attorney for plaintiffs Shareholders'
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DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

SIDNEY MELLONT, et al.,

Plaintiffs,

--VS--

FEDERAL HOME LOAN BANK BOARD,
a sue and be sued agency of the
United States; SAVINGS AND LOAN
COMMISSIONER of the STATE OF
CALIFORNIA (sued herein as
John Doe 1); et al.,

Defendants.

LONG BEACH FEDERAL SAVINGS AND
LOAN ASSOCIATION, a Federal
Mutual Association,

Cross-Claimant,

--VS--

FEDERAL HOME LOAN BANK BOARD, a
sue and be sued agency of the
United States; SAVINGS AND LOAN
COMMISSIONER of the STATE OF
CALIFORNIA (sued herein as
John Doe 1); et al.,

Cross-Defendants.

EQUITABLE SAVINGS AND LOAN
ASSOCIATION, a California corporation,

Cross-Claimant,

--VS--

CIVIL ACTION

No. 65-1230-P.H.

PETITION AND MOTION

FOR PARTIAL ALLOWANCE

ON ACCOUNT OF ATTORNEYS'

FEES FOR PLAINTIFFS'

AND CROSS-CLAIMANTS'

ATTORNEYS IN CLASS

ACTIONS, AND POINTS

AND AUTHORITIES.

1 FEDERAL HOME LOAN BANK BOARD,
2 a suc and be sued agency of the
3 United States; SAVINGS AND LOAN
4 COMMISSIONER of the STATE OF
5 CALIFORNIA (sued herein as
6 John Doe I); et al.,

7 Cross-Defendants.

8 N. JOSEPH ROSS,

9 Intervenor.

1 STATE OF CALIFORNIA, } ss.
2 County of Los Angeles. }

3 T. A. GREGORY, being by me first duly sworn, deposes
4 and says:

5 That he is President of Long Beach Federal Savings
6 and Loan Association and is authorized to make this verification
7 for and on behalf of said Association; that he has read the
8 foregoing "PETITION AND MOTION FOR PARTIAL ALLOWANCE ON ACCOUNT
9 OF ATTORNEYS' FEES FOR PLAINTIFFS' AND CROSS-CLAIMANTS' ATTORNEYS
10 IN CLASS ACTIONS" and knows the contents thereof, and that the
11 same is true of his own knowledge except as to the matters which
12 are therein stated upon information and belief, and as to those
13 matters that he believes it to be true.

14 T. A. GREGORY

15 T. A. GREGORY

16
17 SUBSCRIBED AND SWORN to before me

18 this 22nd day of March, 1968.

19 HEON FRAZER

20 Notary Public in and for said
County and State.

21 [SEAL.]
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23
24
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27
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29
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31
32



LAW OFFICES
CHARLES K. CHAPMAN
OCEAN CENTER BUILDING
LONG BEACH 2, CALIFORNIA
HEMLOCK 2-3447

April 27, 1967

REGISTERED RETURN
RECEIPT REQUESTED

Nossaman, Waters, Scott, Krueger & Riordan
Attorneys at Law
611 Wilshire Boulevard
Suite 1300
Los Angeles, California 90017

Attention: Attorney Jane R. Brady

Re: Pending appeals from attorneys' fee
Judgments and Order re continued
existence of Long Beach Federal from
District Court actions Nos. 63-1072-P.H.,
63-1107-P.H., and 63-1230-P.H.

Dear Miss Brady:

Thank you for your letter of April 19, 1967 enclosing your proposed stipulation for consolidation in the Court of Appeals of the various pending appeals by the different parties from the judgments for attorneys' fees and the order re continued corporate existence of Long Beach Federal.

I do not believe that the order re continued corporate existence of Long Beach Federal is an appealable order. I am therefore not willing to consolidate any of the appeals from that order with the appeals from the judgments for attorneys' fees.

I am willing, however, to stipulate to consolidating all of the various appeals from the judgments for attorneys' fees for the purposes of motions, briefing and argument but not for all purposes. I believe that three separate judgments should be made and entered by the Court of Appeals in the attorneys' fees matters and three separate orders or other appropriate disposition should be made by the Court of Appeals in all of the appeals from the order re the continued corporate existence of Long Beach Federal.

LES K. CHAPMAN

Nossaman, Waters, Scott, Krueger & Riordan
April 27, 1967

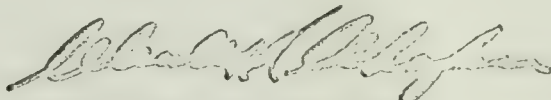
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I will draft and send you shortly two separate proposed stipulations for consolidating the various attorneys' fee appeals in one group for argument etc. Also another separate stipulation for consolidating the various attempted appeals from the order re continued corporate existence of Long Beach Federal into another separate group of appeals for motions etc.

This will not require any changes in the various records on appeals from the three District Court cases Nos. 63-1072-P.H., 63-1107-P.H., and 63-1230-P.H.

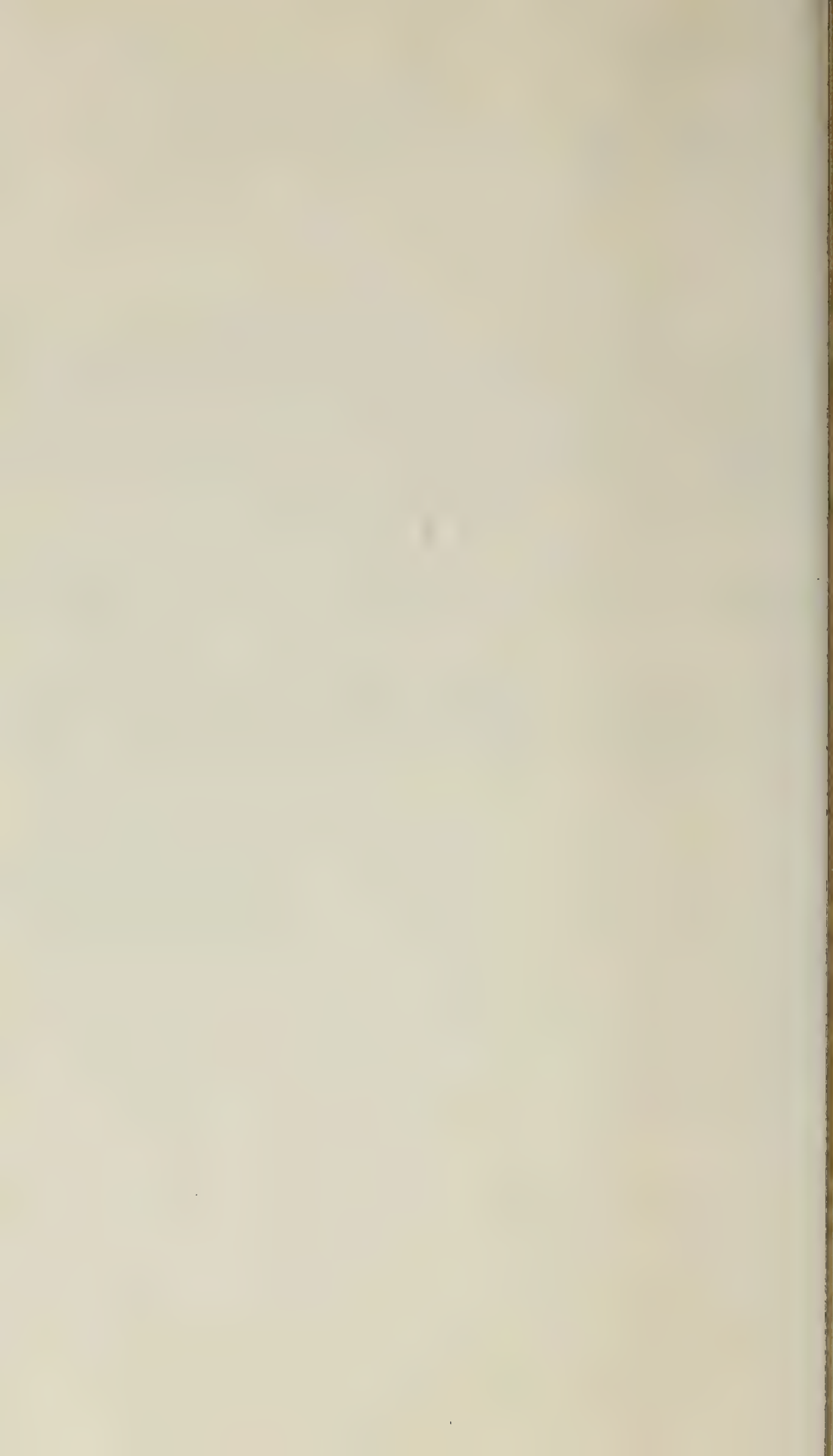
I have inquired concerning the separate numbering of the various appeals so that the proposed stipulations can be appropriately numbered and captioned. When I have such information you will hear further from me.

Yours truly,



CHARLES K. CHAPMAN

CKC/lh



No. 21866

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EQUITABLE SAVINGS AND LOAN ASSOCIATION,
Petitioner,
vs.

HONORABLE PEIRSON M. HALL, JUDGE OF THE UNITED
STATES DISTRICT COURT FOR THE CENTRAL DISTRICT
OF CALIFORNIA,
Respondent.

REPLY BRIEF FOR PETITIONER.

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FILED

JUL 31 1967

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WM. B. LUCK, CLERK

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No. 21866
IN THE
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EQUITABLE SAVINGS AND LOAN ASSOCIATION,
Petitioner,
vs.

HONORABLE PEIRSON M. HALL, JUDGE OF THE UNITED
STATES DISTRICT COURT FOR THE CENTRAL DISTRICT
OF CALIFORNIA,
Respondent.

REPLY BRIEF FOR PETITIONER.

**Preliminary Statement and Summary of the
Litigation Below.**

The Return and Answer that has been filed here is noteworthy for the assiduousness with which it avoids discussion of the basic and determinative question presented by the petition. That question is *not* whether the post-judgment orders made below [see, *Petition*, 12-25] were correct on their respective merits; it *is* whether the issues purportedly determined by those orders were properly cognizable in these proceedings. [See, *Petition*, 5-7.] They were not so cognizable, because they presented no "case or controversy" within the meaning of section 2 of article III of the Constitution of the United States; because they were wholly outside the fair scope of the only case or con-

troversy that was before the court below; because they were not within the court's subject-matter jurisdiction; and because they were disposed of summarily upon motion, rather than by plenary actions in which issues were duly tendered and joined, evidence was taken, and an opportunity to be fully heard in accordance with "such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs . . ." was afforded. [See, *Muskrat v. United States*, 219 U. S. 346, 356-357, 31 S. Ct. 250, 253-254. Also, *Petition*, 12-29, 36-38.] That is the question respondents do not discuss. Yet, unless it is answered, as we submit it may not correctly be, in favor of the cognizability of those issues, the great bulk of the Return and Answer is merely an irrelevancy.¹

The force of what we have just said may best be shown by a short summary of the procedural and historical context in which these writ proceedings arise. The story in this connection is actually a long one, al-

¹The post judgment petitions and motions pertain essentially to: (1) the \$110,000 of certificates of deposit; (2) the so-called Installment Charity Trust; and (3) the tax matters of Equitable Savings and Loan Association. [*Petition Appendix*, 3-24.] All parties concede that none of these issues arose until after the change in Equitable's management, which occurred in June, 1966 subsequent to the hearing on the attorney's fee question and shortly before the judgment for attorneys' fees was entered. To sustain respondents' position it must be held that the court's reservation of jurisdiction included a reservation of jurisdiction over disputes *not yet in existence*. Respondents advance no argument to explain how a trial court can reserve jurisdiction over disputes which may occur some time in the future and which by definition could not have existed when the pleadings were filed.

though, fortunately only a small part of it is needed for present purposes.²

In late 1959, after 13 years of litigation arising out of its seizure by the Federal Home Loan Bank Board, Long Beach began negotiating to merge into a State savings and loan association and become a part of the California state-chartered Equitable Savings & Loan Association. That merger was accomplished pursuant to an agreement executed under date of June 12, 1963, under which, with a view to the ultimate dissolution of Long Beach, as the respondent judge has said [*Elliott v. Federal Home Loan Bank Board, supra*, 233 F. Supp. at 585], Long Beach was merged into Equitable.³ Under the merger agreement, the depositors of

²The story of the instant litigation begins 21 years ago when the appointment of a conservator for Long Beach Federal Savings & Loan Association [hereinafter called simply "Long Beach"] was challenged in an action in the then Southern District of California, which was assigned to Honorable Peirson M. Hall, the respondent judge. Since then 20 or more reported decisions have resulted—they are enumerated by the respondent judge in *Elliott v. Federal Home Loan Bank Board*, S.D. Cal., 233 F. Supp. 578, 584 (fn. 1). Practically all of the great and seemingly endless mass of litigation has been before the respondent judge, by virtue of the operation of the so-called "low-number" rule in the old Southern, now Central District. [See, C. D. Cal. Local Rules, rule 2(g).] A summary of this history prepared by the respondent judge, will be found in *Long Beach Fed. S. & L. Assn. v. Federal Home Loan Bank Board*, S. D. Cal., 189 F. Supp. 589, 597 (fn. 3); and *Elliott v. Federal Home Loan Bank Board, supra*, 233 F. Supp. at 584-585. Local Rule 2(g), in relevant part, provides that all "pending civil actions and proceedings [which appear to arise from the same or substantially identical transactions, happenings or events] shall be assigned to the judge to whom was assigned . . . the case bearing the lowest number . . ."

³Unless otherwise attributed, the statement of facts relating to the protracted litigation below and related events, is taken from the respondent judge's summary of them in *Long Beach Fed. S. & L. Assn. v. Federal Home Loan Bank Board, supra*, 189 F. Supp. at 597-598; and *Elliott v. Federal Home Loan Bank Board, supra*, 233 F. Supp. at 584-585.

Long Beach were to receive a specified number of shares of Equitable stock, proportioned to the amount of their respective deposit balances, after certain specified adjustments, as of November 30, 1962. [*Petition Appendix*, 142-143.] Long Beach's charter provided for equal and pro rata distribution to all of its depositors in proportion to their deposit balances. The distribution of the stock obviously will be substantially different, depending on whether the agreement or the charter prevails. [*Petition Appendix*, 83-87.]

An immediate controversy arose as to which of these two formulas of distribution was to control. Three actions were precipitated by that controversy, which were consolidated and disposed of in one judgment.⁴ Two of these actions purported to be class actions brought in behalf of the depositors of Long Beach. One was origi-

⁴The only issues in these actions, and the only controversy alleged, related to (1) whether the agreement or charter formula of distribution of the stock prevailed; and (2) whether the attorney for the plaintiff Shareholders Protective Committee, should be allowed fees. There was no issue relating to or request made for fees for plaintiff Long Beach or its attorney. And, while in one of the complaints Long Beach alleged a purported claim for "declaratory relief and instructions" [*Petition Appendix*, 48-50] no controversy was alleged. Long Beach was not a plaintiff in the other two actions.

All of this was recognized by the respondent judge, for in one of his opinions he noted that the "central and ultimate question for decision is a limited one . . . Here the stock in Equitable is the thing in dispute and Equitable seeks to know its duty as to whom the stock should be issued" [*Elliott v. Federal Home Loan Bank, supra*, 233 F. Supp. at 583, 588.] In another opinion he said that, "All of the suits, in effect, sought the same relief, viz., to have said 791,650 shares of Equitable Association's stock deposited in court, distributed according to the terms of the statute, the by-laws of Long Beach, the Settlement Agreement of February 14, 1962, and the passbook issued to the shareholders of Long Beach . . ." [*Petition Appendix*, 247-248.] He did not, however, permit his subsequent actions in the cases to be confined to this one "limited" question.

nally brought in the United States District Court, Central District Court; the other in the State Superior Court for Los Angeles County, and removed to the former court. The pleadings in each were virtually identical.⁵ Except for the purported declaratory relief claim in the Federal case, in respect to which no controversy was alleged, these complaints concerned themselves solely with an alleged controversy over the proper distribution formula for the Equitable stock and an alleged forfeiture of the depositors' rights sought to be effected by the merger agreement [*Petition Appendix*, 26, 29-33, 35-42, 43-47, 51-56, 58-64]; and with a request for an allowance of attorney's fees to the plaintiff Shareholders Protective Committee.⁶ [*Petition Appendix*, 42, 67-68.]

The third action was an interpleader and declaratory relief action brought by Equitable to resolve the conflicting claims made upon it in respect of the stock to be distributed to the depositors of Long Beach.⁷ The

⁵In the State Court action, Long Beach was not a party-plaintiff, and so there was in it no counterpart of the claim for "declaratory relief and instructions" found in the Federal case. There was, however, a count for declaratory relief in respect of an actual, existing controversy, over, but *only* over, the rights of the depositors in and to the Equitable stock, as affected by the merger agreement and the Long Beach charter. [*Petition Appendix*, 68-71.]

⁶Note that in the only case in which Long Beach is a plaintiff, the allegation relating to fees found in paragraph VI of the First Claim for Relief [*Petition Appendix*, 42-43] is not re-alleged in Long Beach's claim for "Declaratory Relief and Instructions." [*Petition Appendix*, 48, paragraph I.]

⁷The complaint, though signed by Moore & Lindelof, was in fact prepared, at least in first draft, by Charles K. Chapman, who was then, and he now claims to be, attorney for Long Beach. [See, *Supp. Appendix*, p. 19, lines 20-29.] Nevertheless, he named Long Beach as one of the parties-defendant, alleging its continued existence notwithstanding it had been merged into Equitable. [*Petition Appendix*, 76, paragraph 3.]

only controversy alleged and the only issues of fact tendered by that complaint related strictly to the question of how and by what formula the stock should be distributed.⁸ [*Petition Appendix*, 76-91].

A so-called “class action judgment” in the consolidated actions was entered, from which an appeal to this Court has been taken by the government defendants. That judgment, together with the “judgments for attorneys’ fees” disposed of all the issues tendered or joined in the three actions, *i.e.*, distribution of the stock and allowance of fees to the Committee’s attorney. [*Petition Appendix*, 101-118.] It was not, however, the end of the litigation. Since entry of those judgments, various motions have been made by counsel for Long Beach and entertained by the respondent judge. These motions and the rulings on them have had the effect of subjecting petitioner Equitable to the same kind of supervision and control by the respondent judge as though it had been put in the hands of an equity re-

⁸One paragraph of the prayer, taken out of context and read by itself, seems to go beyond this controversy [*Petition Appendix*, 90-91]; and it is the one upon which respondents mainly, if not entirely, rely as the basis for the various post-judgment orders that have been made by the respondent judge. Even in language, however, that paragraph may be read as limited to relief in respect of the rights of the parties in and to the stock that was the sole subject-matter of the action and the certificate for which had been deposited with the Court. It must be so read, when it is kept in mind that the only controversy alleged related only to those rights; that “Federal courts have jurisdiction only where a case or controversy is involved . . .” [*Flight Engineers International Assn. v. Continental Airlines*, 9 Cir., 297 F. 2d 397, 401-402]; and that the prayer is no part of the charging allegations of a complaint and cannot serve to enlarge the complaint to include a claim or cause of action not embraced within the allegations of fact, since “the prayer for relief is in fact no part of the claim or case of action stated” [*Peitzman v. City of Illmo*, 8 Cir., 141 F. 2d 956, 962, *cert. den.* 323 U.S. 718.]

ceiver or other officer subject to the court's control. Nor is that merely a transient condition. The import of the orders in question is to continue that subjection to the court's supervision and instructions into the indefinite and unlimited future, with respect to any matter relating to the duties or obligations of any of the parties under the merger agreement or the so-called "Installment Charity Trust."⁹

Any time, therefore, that plaintiffs' counsel is so advised, he may apply to the respondent judge for instructions, advice or a ruling on any matter connected with Equitable's business that has any conceivable relation to the former activities of Long Beach; and thus force Equitable into summary proceedings in place of its right to have its rights determined only after a full and orderly hearing had according to the mode and in the plenary proceedings established by the law of the land. So, this is not simply a case of the rendition of an order or two, from which relief may be obtained by an appeal. It is a case of a crass usurpation

⁹That is shown by the fact that a motion for an "order to all parties adjudging, declaring and ordering all parties to discharge their respective duties and obligations under: A. The Merger Agreement . . . and B. The Installment Charity Trust" was made by Long Beach and Mr. Chapman [*Petition Appendix*, 183, 203-205] and granted. [*Petition Appendix*, 206-208.] It is also shown by the fact that the principal petition filed by Long Beach requested, among other things, instructions "from time to time" with respect to the conduct of numerous litigations and the "use, holding or payment" of the Certificates of Deposit, [*Petition Appendix*, 119, 134. Also, see footnote 10, *infra*.] See, also, in this regard, Mr. Chapman's description of the scope and extent of the tax and merger matters with which he would not *then* trouble the court. His statement is quoted at page 23 of the petition. Implicit in it is the intention to bring those matters before Judge Hall from time to time in the future, presumably in summary fashion, as Mr. Chapman has done with the other matters to which this writ proceeding is directed.

of power by the respondent judge and the consequent deprivation of the petitioner's right to due process of law.

As the result of these post-judgment proceedings Equitable has already been subjected summarily to the following orders:

1. That the Clerk of the Court below accept from Long Beach the deposit of 16 Certificates of Deposit in the aggregate sum of \$110,786.89, payable to the Clerk of the Superior Court, Los Angeles County, Long Beach Branch; and that the parties, including Equitable appear and show cause why the Petition of Long Beach for Instructions re Conduct of Pending Litigation and Use of Assets [*Petition Appendix*, 119-134] should not be granted and the relief and court orders asked therein should not be ordered.¹⁰ [*Petition Appendix*, 3-5, 13.]

2. That the proceeds of the aforesaid Certificates of Deposit be invested and reinvested by the Clerk in short-term U. S. Treasury Bills, pending further order of the court, the final disposition and ownership of said Certificates and their pro-

¹⁰The "relief and court orders asked therein" included the prayer that Long Beach be directed by the court below "from time to time concerning the further prosecution, defense or other conduct" of various pending actions in which Long Beach, notwithstanding its merger into Equitable, asserts it is a party. The petition leaves the number of such actions uncertain [see, e.g., *Petition Appendix*, 925 (paragraph B-3), 126 (paragraph B-5)]; but there are alleged certainly not less than ten of them. [*Petition Appendix*, 122-126.] Even in a case in which an equity court will customarily entertain a petition for instructions, as for example a trustee of a trust over which the court has supervision, an advisory order will not be made; there must, as in any case, be an actual controversy affecting the rights of the parties. [*Gillette v. Gillette*, 122 Cal. App. 640, 10 P.2d 760, 761-762.]

ceeds of the dividend check hereinafter in subparagraph 4 referred to, having been taken under submission by the court. [*Petition Appendix*, 23-24.]

3. Order declaring, notwithstanding that Long Beach has been merged into Equitable, that “the separate corporate existence of [Long Beach] yet continues. Said association has not been dissolved but is yet a separate corporate entity . . . and as such has the right to choose its own counsel to represent said association in pending or other litigation and in other matters.” [*Petition Appendix*, 6, 9 (paragraph 1), 11 (paragraph 1).]

4. That the Clerk of the court below endorse a dividend check for \$26,400.70, cash it, invest the proceeds in U. S. Treasury short term bills, and re-invest as the bills mature. [*Petition Appendix*, 11-12 (paragraph 3).]

5. That Equitable “serve on all parties and file with this court a report of the present status of all California Franchise and Corporation and Bank Taxes and all U. S. income or other taxes asserted against or imposed upon Long Beach Federal since the merger . . . or resulting from the merger.”¹¹ [*Petition Appendix*, 20 (para-

¹¹Under the merger agreement, Equitable became “subject to all the debts and liabilities of Long Beach as though Equitable had incurred them . . .” [*Petition Appendix*, 138, 140]; and it agreed “to assume and discharge each and every obligation of Long Beach, including, without in any way limiting the generality of the foregoing, all income, franchise, sales and other tax liabilities incurred for all taxable periods to the said effective date; and to assume the performance of all contractual [sic] and other obligations of Long Beach incurred prior to the

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graph 2).] The content of the report thus ordered was spelled out in detail in the order; and, it was further ordered, “representatives of Long Beach Federal, including Attorney Charles K. Chapman . . . and Attorney George W. Trammell for . . . the Shareholders’ Protective Committee . . . and Attorney Harvey Grossman for Intervenor N. Joseph Ross, shall each be entitled to notice of, and to participate in, any and all future tax hearings, conferences, negotiations or discussions with any State or Federal Tax agents or representatives concerning said taxes . . .” [*Petition Appendix*, 20-21 (paragraph 3); i.e., “taxes asserted against or imposed upon Long Beach Federal since the merger . . .”¹² [*Petition Appendix*, 20-21 (paragraph 1). Italics ours.]

effective date and to indemnify and hold harmless Long Beach . . . with respect to such liabilities and obligations . . .” [*Petition Appendix*, 13 (art. XIII). (Italics ours.).]

In view of the type of tax liability feared by respondents, because of which they claim the right to have a report and notice of liability for taxes and the right to participate in hearings relative to such liability, it is important to note that Equitable was not subjected to and did not assume any obligation or liability for taxes, or anything else, that was not incurred by Long Beach *before* the effective date of the merger agreement; and it assumed no liability or obligation of any kind, and irrespective of the date incurred, for any tax liability incurred by or imposed upon any Long Beach shareholder or depositor.

¹²Before making this order, the respondent judge, in the course of a discussion of the extent of Equitable’s assumption of Long Beach’s tax liability, inquired of Equitable’s counsel if they were in a position “to state that if tax liability is imposed on Equitable as a result of the merger [*not*, it should be noted, a tax liability incurred by Long Beach before the merger, see footnote 11, *supra*] that that . . . will not be shifted . . . to only the Long Beach depositors . . .” [*Return and Answer*, 39-40.] After conferring with their client, counsel replied that Equitable’s assumption of liability under the merger agreement “remains in full force and effect and will continue in full force

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To the extent the relief and orders embraced in the motions and petitions filed by Long Beach have not been disposed of by the orders already made, the respondent Judge reserved his asserted jurisdiction and had fixed a date for further hearing.¹³ [*Petition Appendix*, 16, 21.] It is apparent, therefore, that he intends to act, and when free of this Court's stay will act, upon the omnibus requests for instructions and other forms of relief that are embraced in those motions and petitions. [See, e.g., *Petition Appendix*, 134 (directions "from time to time concerning conduct of various litigations"); 119 (instructions re "use of assets"); 183 (order requiring "all parties to discharge their respective duties and obligations" under the merger agreement and the "Installment Charity Trust.").]

The gross disregard of established and accepted modes of procedures, the usurpation of judicial power, and the threat to Equitable's independence and right to manage its own business, exhibited by these proceedings, certainly present the "extraordinary situation" to which a writ of mandate or prohibition may and should be directed [See, *Petition Appendix*, 287-297.]

and effect throughout the tenure in office of present management." Counsel for the committee commented that this did not meet "the requirements of the court's question in any way." The respondent judge agreed with that comment, pointing out that "nobody can outguess the Internal Revenue Bureau, and conceivably they may try to impose an additional tax on *Equitable* as a result of the merger." [*Return and Answer*, 42-43. *Italics ours.*] The point that seemed to elude the Judge was that Equitable did not assume any and every tax imposed "because of the merger" on anyone, but only such tax as *Long Beach*, and only Long Beach, incurred *before* the merger.

¹³F.R.C.P., rule 54(b) may not be invoked to confer a continuing jurisdiction when the only claim for relief presented has been adjudicated and final judgment rendered. [*CMAX, Inc. v. Drewry Photocolor Corp.*, 9 Cir., 295 F. 2d 695, 697, and the numerous cases there cited.]

ARGUMENT.

I.

There Was No Case or Controversy Before the Court Below in Respect of the Matters Involved in the Post-Judgment Orders.

Not a one of the post-judgment orders to which we have referred responded to any issue tendered, or controversy between the parties alleged, in the cases in which they were rendered. They were, therefore, made in excess of the court's jurisdiction, for, in respect of them, there was no case or controversy before the court. The United States Constitution, art. III, sec. 2, of course, limits the jurisdiction of the courts of the United States to actual cases or controversies, as this Court has noted. [*Flight Engineers International Assn. v. Continental Air Lines*, *supra*, 297 F. 2d at 401-402.] “. . . By cases and controversies,” the Supreme Court has authoritatively said, “are intended the claims of litigants brought before the courts for determination by such *regular proceedings as are established by law or custom* for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs . . . the judicial power conferred by the Constitution . . . is the right to determine actual controversies between adverse litigants, *duly instituted* in courts of proper jurisdiction . . .” [*Muskrat v. United States*, 219 U. S. 346, 356-357, 361-363, 31 S. Ct. 250. Italics ours. To the same effect: *In re Pacific Ry. Commission*, C.C.Cal., 32 Fed. 241, 255-257 (Field, Circ. Justice); *United States v. Choate*, 5 Cir., 276 F. 2d 724, 728.]

The proceedings by which the orders here in question were obtained were not “duly instituted;” they were not

“such as are established by law or custom.” [See, *Petition Appendix*, 270-274, 282-287, 296-297. Also, Point I, 4, *infra*.] They were not instituted by a complaint in which a controversy affecting some justiciable right or duty of the parties was alleged; and in respect of which the trial and other procedures provided by the Rules of Civil Procedure were made available and used. Instead, they were instituted simply by motion, in a case in which no issue respecting the subject of the motions had been raised; and they were heard and determined summarily rather than in a full and open trial on the merits. There was, therefore, no case or controversy before the court below, so far as concerns any of the rights or duties purportedly adjudicated by these orders.

1. The Deposit With the Clerk of the Certificates Did Not Give the Court Jurisdiction to Determine Any Claims of Ownership or Interest in Them.

An apt illustration of the application of the “case or controversy” rubric to a situation not unlike one of those here involved is *United States v. Drossner*, 3 Cir., 179 F. 2d 509. There, money taken by the FBI from some thieves of government property, was used in evidence. After the trial in which the money was used had been completed, the U. S. Attorney gave it to the Clerk of the Court for deposit in the registry of the court. The asserted owner of the money petitioned the court for its return to him. On an appeal from the order made on that petition, the Court of Appeals held that the Court below was without jurisdiction to decide who was entitled to the money, because there was no justiciable controversy before the Court. [See, also, *United States v. Rice*, 3 Cir., 176 F. 2d 373, 375-376.]

The order here involved, relating to the Certificates deposited with the Clerk, is obviously analogous.

If there is a bona fide dispute over ownership or other rights in the Certificates, the remedy, it is obvious, is an appropriate action—quiet title, declaratory relief or the like—by one claimant against the other. Except for diversity of citizenship or joinder of a Federal governmental agency, such an action would not be cognizable in a Federal court. Certainly, it is not made cognizable by the device of depositing the certificates, or ordering them deposited, in connection with an otherwise unrelated action pending in such a court.

Nowhere in the Return do respondents controvert Equitable's assertion that no case or controversy exists as to the certificates of deposit, because, as stated in the Petition, "no right, title or interest to the certificates of deposit was claimed by anyone other than petitioner." [*Petition*, 14.] Respondents discuss the certificates of deposit at length [*Return and Answer*, 178 *et seq.*], conceding, in the course of that discussion that Equitable has indeed a claim to them arising out of the merger.¹⁴ Nowhere, however, do they assert or even intimate any adverse claim or interest by anyone else.¹⁵

¹⁴The Certificates originally belonged to Long Beach, by purchase before the merger. [*Return and Answer*, 173, fn. 83 and footnoted text.] Under the merger agreement, all of the assets and property of Long Beach went to Equitable. [*Petition Appendix*, 137 (art. I), 138 (art. II).]

¹⁵Respondents attempt to convey the impression that Equitable has acquiesced in the Respondent Judge's assertion of jurisdiction over the certificates by its stipulation in the Superior Court to the endorsement of the certificates by the Clerk of that court. Quite the contrary is true.

The certificates in question were in the physical possession of the Clerk of the District Court but payable to the Clerk of the
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2. The Declaration of the Continued Existence of Long Beach Was Purely Advisory and Abstract, Unrelated to Any Live Issue or Actual Controversy Below.

Obviously, nothing concerning the corporate existence or non-existence of Long Beach was involved in determining what persons were entitled to receive, and in what amounts they were entitled to receive, the Equitable stock; or in determining how much, if any, fees were to be allowed the Protective Committee's attorney. Yet, those were the only issues in the cases in which the declaration was made. In that context, the declaration was and could only have been purely advisory. A federal court has no power or jurisdiction to make an order of that kind. Of course, a declaratory judgment may be rendered in a case regularly instituted and prosecuted to that end; but even then only in cases of a concrete and actual controversy affecting the rights or duties of the parties. [*Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 73-74, 47 S. Ct. 282, 283;

Superior Court. The Superior Court proceeding adverted to by the respondent was initiated by Long Beach, which had been ordered by the respondent judge to petition the Superior Court for an order directing the clerk of that court to endorse the certificates over to the Clerk of the District Court. [*Petition Appendix*, 12 (paragraph 4).] The petition, prepared by Mr. Chapman and filed in the Superior Court, contained allegations unnecessary to the execution of the Order of the District Court and which could be res judicata if not controverted. [*Return Appendix*, 197.] Equitable, therefore, filed an answer to it.

To avoid the necessity of concurrently litigating similar issues before both the District Court and the Superior Court, counsel for Long Beach and Equitable stipulated that the endorsement might be made, at the same time agreeing that none of the allegations of the petition was admitted, and that all of Equitable's claims, contentions, rights and demands were preserved. [*Return Appendix*, 210-212.] Obviously, this was not a concession of jurisdiction in the District Court as respondents now assert. To the contrary, it preserved intact all of Equitable's objections to jurisdiction.

Aetna L. Ins. Co. v. Haworth, 300 U.S. 227, 236, 239-241, 57 S. Ct. 461, 462, 463-464.]

Nothing of that sort was involved in the case at bar.¹⁶

The fact that the Long Beach "charter" was deposited with the Clerk [*Petition Appendix*, 49]—added nothing to the court's jurisdiction. The charter is only a document evidencing the fact that official permission to engage in a regulated business in corporate form has been given. It is not itself the corporation, or the right to do business. That right is, of course, an intangible one. An actual controversy over it, affecting some one's rights or duties, could, no doubt, be the basis of a case. Absent such a controversy, the deposit of the document no more gave the respondent judge the jurisdiction to make a judicial declaration in respect of it, than, had a promissory note been deposited, he would have had jurisdiction, on motion in an otherwise unrelated case, to adjudge the maker obligated to pay it. [*Cf.*, *United States v. Drossner*, *supra*, 179 F. 2d 509; *United States v. Rice*, *supra*, 176 F. 2d at 375-376.]

3. The Order Relating to Equitable's Taxes and the Installment Charity Trust Was Not Embraced Within the Scope of Any Case or Controversy Properly Before the Court Below.

Mr. Charles K. Chapman was not a party to any of the three actions below, to which these writ proceedings are directed. He has not appeared as a respondent or real party in interest in these proceedings. Nonethe-

¹⁶If the question had been properly cognizable below, it would have to be answered quite differently from the way the District Judge answered it. [See, Point II, *Second, infra*.]

less, in those three actions he (describing himself as “holder of judgment of this Court for attorney’s fees”) and Long Beach jointly filed a motion to order all parties to discharge their respective duties and obligations under the merger agreement and “Installment Charity Trust.” [*Petition Appendix*, 183-202.] Apparently—although Mr. Chapman’s penchant for prolixity and irrelevancy of pleading makes it difficult to be sure¹⁷—what was being aimed at was the injection of representatives of Long Beach into conferences, negotiations and proceedings dealing with Equitable’s tax problem. [See, *e.g.*, *Petition Appendix*, 197-199.] The objective sought in respect of the Installment Charity is similarly obscure. It seems to center around an alleged failure on Equitable’s part to pay \$1,662.50 of pre-paid interest and to transfer a certain promissory note for \$33,600, to the Poor Sisters of Nazareth of Los Angeles, Inc. [*Petition Appendix*, 195-196.]

This much, however, is certain. The issues over representation of Long Beach in the tax proceedings and of Equitable’s obligation, if any, to the Poor Sisters, have nothing at all to do with the question of how and to whom the deposited Equitable stock should be distributed or how much, if anything, should be paid the Protective Committee’s attorney. Consequently, for the reasons to which we have already adverted, there was no “case or controversy” in the constitutional sense presented by the Chapman-Long Beach petition. [See, the cases cited, *passim*, Point I, *supra*.]

¹⁷This Court has made a similar criticism of his pleading style. [See, *Chapman v. Goodman*, 9 Cir., 219 F. 2d 802, 805.]

If Long Beach has a justiciable right to inject itself into Equitable's tax proceedings, and the right is being denied it, no doubt relief may be obtained by an appropriate action brought in a court having jurisdiction. That court would not be a Federal court, since there is neither diversity of citizenship nor a federal-law question. How then, did the court below get jurisdiction to determine and adjudicate the asserted right? Respondents do not, they cannot, answer that question.

By the same token, if the Poor Sisters have a justiciable right against Equitable, it may be enforced by *them*, through an action in an appropriate court. Here, again, that court would very likely not be a Federal court. And, additionally, what standing does either Mr. Chapman or Long Beach have to enforce this or any other right of the Poor Sisters?

Respondents' contention apparently is that it was Equitable that brought these matters into issue below. [*Return and Answer*, 109-120.] The contention is based on the fact that T. A. Gregory, then Equitable's President, was one of those who verified Long Beach's petition for allowance of a fee to its attorney;¹⁸ and that Mr. Gregory testified "on behalf of the petition for allowance of attorneys' fees . . ." [*Return and Answer*, 109.] Of course, these are immaterial circumstances. Federal jurisdiction is a limited and narrow one. Absent otherwise, it cannot be supplied by consent or stip-

¹⁸The return does not make clear the capacity in which Mr. Gregory verified. Examination of the allowance petition will show, however, that he did so as President of Long Beach, not in any capacity representative of Equitable. [*Supp. Appendix*, 40.]

ulation, but only by the existence and proof of the facts upon which it depends.¹⁹

Furthermore, the question in respect of the Charity Trust was whether a loan incident to it was actually a loan to Mr. Chapman or a payment for legal services. The respondent judge's ruling on that question is now on appeal to this Court, as Mr. Chapman himself asserted when it suited his purpose to do so. [*Supp. Appendix*, Letter of 4/27/67.] Respondents offer no theory upon which it could be held that the respondent judge could retain jurisdiction embraced within the scope of a judgment or order on appeal. [See, *Petition Appendix*, 279.] The inconsistency between the position of the respondents who assert that a new proceeding involving the Charity Trust may be maintained, and the position of Mr. Chapman, who seeks to prosecute that proceeding but at the same time concedes that the matter is on appeal, is irreconcilable. The issues relating to the Installment Charity Trust must fall into one of two categories. Either they are issues already considered by the respondent judge and now the subject of pending appeals, because of which there was no longer jurisdiction in the trial court, or they are new matters raised after final judgment and involving new parties, presenting no basis for federal jurisdiction. Either way, the respondent judge had no jurisdiction to entertain the proceedings.

¹⁹ " . . . It is axiomatic that the district courts of the United States are courts of limited jurisdiction. No one can confer jurisdiction upon them, if it does not exist. And it may be inquired into and questioned, even by the litigant invoking it in the first instance, and despite the most solemn stipulations." *Arenas v. United States*, S.D. Cal., 95 F. Supp. 962, 972 (and numerous cases there cited in note 29), affirmed 9 Cir., 197 F. 2d 418.]

4. The Post-Judgment Orders Involved a Departure From the Accepted and Usual Course of Judicial Procedure. Thus, There Was No Case or Controversy, Because the Proceedings Were Not Carried on in Accordance With the Rules of Civil Procedure.

In response to our contention that there was a “departure from the accepted and usual course of judicial proceedings” [*Petition*, 25-29], an attempt is made to justify the procedure followed below, by reference to the fact that, pursuant to 28 U.S.C., sec. 2361, Equitable “obtained interpleader permanent injunctions . . .” [*Return and Answer*, 138.] The theory in that regard seems to be that by issuance of an order to show cause there was drawn within the court’s jurisdiction anything and everything that the responding parties cared to offer as “cause.”

Assuming that Section 2361 permits the District Court to issue orders to show cause and orders restraining claimants from instituting other proceedings when a complaint in interpleader is filed, there is no authority that every subsequent procedure in an interpleader case may be brought on for a hearing by an order to show cause; or that any and every desired dispute may be injected into the case by the response to the order. This would be especially true with regard to a new claim for relief or cause of action unrelated to the original complaint, as was the situation in the case at bar.

Respondents cite many cases, apparently for the proposition that an Order to Show Cause Procedure is

proper procedure in the within action. All of the cases, however, (except one California Supreme Court decision, which was cited only as a definition of an Order to Show Cause), were decided prior to 1935 and therefore are not applicable under the Federal Rules of Civil Procedure which became effective in 1938. "[S]ince the effective date of the New Rules of Civil Procedure, rules to show cause have not been properly a part of civil practice." [*U.S. v. Rollnick*, M.D. Pa., 33 F. Supp. 863, 865. See, also: *Walling v. Moore Milling Co.*, W.D. Va., 62 F. Supp. 378, 381-382.]

An order to show cause, a leading authority has said, "should be no part of the federal civil practice. A simple motion is to be preferred to a formal order to show cause which . . . if entertained at all will be treated as a motion under the rules." [Barron & Holtzoff, *Federal Practice and Procedure*, sec. 244, p. 17.] And even if such an order were proper, there would still be no basis in the instant case for the extensive adjudication made and relief given in respect of matters not in controversy or which were new and beyond the scope of the cases in which the order to show cause was issued, and which adjudication was made after all issues properly cognizable in those cases had been disposed of.

II.

The Post-Judgment Orders Were Erroneous on the Merits, Assuming the Merits Were Properly Cognizable Below.

For the reasons just advanced, as well as those heretofore presented [see, *Petition*, 36-39; *Petition Appendix*, 269-287], the post-judgment orders were in excess of the lower court's jurisdiction. That being so, it is immaterial here whether the orders otherwise correctly decided the matters to which they were addressed. The great bulk of the long written argument submitted by respondents is devoted, not to the cognizability of those matters but to their substantive merits. We do not propose, by replying at equal length, to divert or distract attention from the one issue really involved—which is not the correctness *vel non* of the orders, but whether the matters they purported to adjudicate were properly cognizable at all in the cases then pending. Accordingly, we will not reply at length or in detail to respondents' argument on the substantive merits.

Nonetheless, in order not to leave any impression that there is no good reply to the merits, we will sketch, in summary fashion, the nature of that reply in respect of the matters principally emphasized by respondents, *i.e.*, representation in Equitable's tax proceedings, and continued existence of Long Beach. We shall also list and briefly discuss the utter irrelevancies with which the Return is larded.

First: Respondents' position in respect of the tax situation is based on fears and unfounded assumptions that everyone concerned, other than Long Beach, will misconduct themselves or act negligently. The position is that the taxing authorities may attempt to

assess \$4,000,000.00 additional taxes upon a certain sum received by Long Beach in 1962 as damages and, if successful, may assert transferee liability against the former Long Beach depositors for these taxes. [*Petition Appendix*, 197-199.] The real parties in interest do not suggest that their situation is materially different from that of any corporate shareholder upon merger. Nor do they suggest that the Merger Agreement affords them a right to participate in Equitable's tax negotiations. Neither the depositors nor Long Beach is in any different posture, in respect of tax liability, from that in which any corporation that has been merged into another and its shareholders find themselves. The controlling legal principle is that it is the surviving corporation—in this case Equitable—upon whom the unpaid taxes of the merged corporation must be assessed. [*Commissioner v. Oswego Falls Corp.*, 2 Cir., 71 F.2d 673, 675.] Any improper exactions by the taxing authorities against either Long Beach or its stockholders may be remedied by the aggrieved taxpayer, precisely as any other imposition of an assertedly improper or illegal tax is remedied.

Furthermore, Long Beach's fears are illusory. As recipients of Equitable shares directly from Equitable in exchange for their existing interest in Long Beach, the former Long Beach depositors are not transferees of any Long Beach assets. [*Vending v. Comm'r.*, 2 Cir., 229 F. 2d 93.]

Of more significance, is the fact, overlooked by the respondents, that they will have the benefit of the bar of the Statute of Limitations which is imposed by Int. Rev. Code, §601(b). If the shareholders are in fact transferees of Long Beach assets, no deficiency may now be assessed against them for unpaid 1962 federal

income taxes of Long Beach. [Cf., *Commissioner v. Oswego Falls Corp.*, *supra*, 71 F. 2d at 675.]

The potential harm to Long Beach, never defined, but presented to the District Court as a real danger justifying the requested order, is equally illusory.²⁰ No act, stipulation, or waiver by Equitable can bind Long Beach Federal if, as it contends, it yet exists. [See, *Commissioner v. Oswego Falls Corp.*, *supra*, 71 F. 2d at 675.] If, however, the corporate existence of Long Beach terminated upon merger with Equitable no harm can come to it. Moreover, the Statute of Limitations has also run in favor of Long Beach Federal if it still exists.

Second: Long Beach does not have a present, separate existence. Regardless of whether any formal, ministerial act required either by law or by the merger agreement has been consummated, there has been a *de facto* dissolution of Long Beach. It is now a mere corporate shell, without assets or capacity to perform the functions for which it was incorporated, and without valid reason for delaying formal dissolution. Such a state of affairs amounts to a *de facto* dissolution. [See, *Hentschel v. Fidelity & Dep. Co.*, 8 Cir., 87 F. 2d 833, 836; *ABC Brewing Corp. v. Commissioner*, 9 Cir., 224 F. 2d 433, 492.]

²⁰In its Motion for Directions Long Beach asserted: “. . . if Long Beach were ‘un-merged’ from Equitable, . . . Equitable might retain Long Beach’s over \$88,000,000 of assets free of Long Beach Federal taxes.” [*Petition Appendix*, 199.] How this could be accomplished is nowhere explained. And, if accomplished, why appropriate redress in a court having jurisdiction could not be obtained, is also not explained. Actually, if there were an “unmerger,” any segregation of assets and liabilities would be supervised and directed upon an equitable basis by the court ordering such relief. [See, *e.g.*, *United States v. Manufacturers H. Tr. Co.*, S.D.N.Y., 240 F. Supp. 867, 956.]

Even if we apply the law applicable to dissolutions, no technical formal act by the Federal Home Loan Bank Board was required to dissolve Long Beach Federal, because official permission to dissolve was given in advance. The language of the Merger Agreement approved by the Federal Home Loan Bank Board, is this:

“The purpose of the Agreement is to provide for the dissolution of the Federal Charter of Long Beach by way of merging of Long Beach into Equitable as surviving association . . .

* * *

“Long Beach shall, upon the effective date, be merged into Equitable and Equitable shall thereafter be the surviving corporation or resulting Association . . . The Separate corporate existence of Long Beach shall cease upon appropriate action by the Federal Home Loan Bank Board or by law.” [*Petition Appendix*, 137, 119-140.]

The above language, which was approved by all parties, clearly indicates an intent to terminate the separate corporate existence of Long Beach Federal upon the date of the merger, whether it is called a merger or a dissolution. Surrender of the charter is not a condition to the termination of the corporate existence of Long Beach. Section 546.4 of Title 12 of the *Code of Federal Regulations* (under which the within merger was accomplished) provides in pertinent part as follows:

“When dissolution has been consummated in accordance with the plan approved by the Board, a certificate evidencing that fact, supported by such evidence as the Board may require, shall

forthwith be filed with the Board. Upon receipt of evidence satisfactory to the Board that such dissolution has been so consummated, the Board will terminate the corporate existence of the dissolved Federal Association and its *charter shall thereby be cancelled.*" (Italics ours.)

The mandatory language of the regulation, coupled with the language of the merger agreement and the fact that Long Beach has given "evidence satisfactory to the Board that such dissolution has been so consummated" [see *Petition Appendix*, 244-246], make it clear that Board approval is now only a formal ministerial act which cannot be withheld. Thus, we reach the conclusion that the corporate existence of Long Beach Federal has terminated, even under applicable law regarding dissolution.

If "merger" law is applied to the facts of this case, it is equally clear that Long Beach ceased to exist. Equitable, as the successor by merger to Long Beach and as a corporation chartered by the State of California, continues within itself the activities of the merged corporation. Whatever existence Long Beach may yet have could only be that carried on through Equitable. [*Jackson v. Continental Telephone Co.*, 214 Cal. App. 2d 510, 28 Cal. Rptr. 1; *J. C. Peacock, Inc. v. Hasko*, 196 Cal. App. 2d 363, 16 Cal. Rptr. 525 529-530; *Cal. Corp. Code* §4116. The cited section of the Cal. Corp. Code provides:

"Upon merger or consolidation pursuant to this article, the separate existence of the constituent

corporations ceases, and the consolidated or surviving corporation shall succeed, without other transfer, to all the rights and property of each of the constituent corporations . . .”]

Third: (1) The grossly inaccurate, even defamatory, allegations concerning verification of Equitable’s financial statements, its branch applications and its merger with Van Nuys Savings & Loan, have no relevancy to anything that was properly or even improperly before the court below. They are asserted apparently as a repudiation by Equitable of its assumption of the liabilities of Long Beach. [*Return and Answer*, 62-69.] They are plainly nothing of the kind; and there is nothing in the voluminous Return or its even more voluminous appendix to show that even so little as one cent of Long Beach liabilities have not been or will not be met by Equitable in strict conformity to the merger agreement.

(2) At pages 32-33 of the Petition, we pointed out that the order permitting participation in Equitable’s reorganization negotiations was made without any request therefor in the moving papers. As a consequence, we noted, Equitable had no opportunity to object “to its own former attorney representing an interest adverse to his former client.” Although 18 pages are devoted to a reply, there is no denial in it of the fact that there *was* a conflict of interest. The burden of the reply is that Equitable did have an opportunity to object, because its counsel were present in court when the respondent

judge made his ruling. [*Return and Answer*, 120-13.] The “ruling” relied on, was not that at all, but merely a passing comment from the Bench, made in the course of a colloquy between court and counsel. Furthermore even if it were a ruling, it did not specify Mr. Chapman as the representative of Long Beach who was to participate. [See, *Return Appendix*, 278 (lines 10-15).]

(3) The fact that in the “class action judgment” Equitable was designated an “elisor” [*Petition Appendix*, 105, paragraph VI] is of no consequence. An elisor is “a person appointed to perform certain duties pertaining to certain officers, when the latter are disqualified . . .” [*Doherty v. Kalmbach*, D.C.Cir., 87 F. 2d 539, 541, quoting *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341, 343.]

The court’s use of the word “Elisor” adds nothing to the judgment that Equitable distribute the stock pursuant to the court’s order. Equitable submitted to no more jurisdiction than any other corporation which is ordered to do a specific act to be performed, such as to distribute stock. Even if Equitable is some sort of agent of the court, there is no justification for, as respondents cite no authority to justify, ordering Equitable to file reports unrelated to the stock distribution or to appear to answer the various post-judgment motions and petitions that have been filed by Mr. Chapman.

III.

Petitioner Has No Remedy by Appeal Adequate to Protect Against the Injury to It From the Extraordinary Usurpation of Judicial Authority to Which It Is Being Subjected.

Mandamus is not being used by us as a substitute for a hearing on the merits of the three appeals now pending in this court, [*Return and Answer*, 30-35.] Respondents' suggestion to that effect is clearly without merit:

(1) *The Judgment for Attorneys' Fees.* This judgment is not a subject of the within Petition. The appeal from that judgment will not be affected by the decision at bar.

(2) *The Order that Long Beach Federal Yet Ex-its, etc.* Prior to the time the within Petition was filed, counsel for Long Beach asserted that this order was not appealable.²¹ He now asserts that the within petition will prevent a hearing on the merits. In either case an appeal is not an adequate remedy, for the reasons adequately stated at pages 33 and 34 of the petition.

(3) *The Judgment re Taxes.* There can be no appellate hearing on the merits of the order re taxes because Equitable's compliance with the order will render an appeal moot before the appellate process can be completed. With regard to this appeal, Equitable must

²¹See letter from Mr. Chapman dated April 27, 1967, *Supp. Appendix*.

seek this Writ of Mandamus or be deprived of any remedy.

Although they urge that petitioner be left to its remedy by appeal, respondents nowhere deny that the course of conduct they have pursued and intend to pursue in the future in the District Court is causing irreparable harm to petitioner. They do not disavow the expressed intent of Long Beach to bring before the court below in the pending litigation all questions regarding *Equitable's performance* of its obligations under the Merger Agreement.²² They do not deny that their conduct constitutes the imposition of a second tier of management to oversee the business decisions of Equitable's management; and although they suggest no harm can come to Equitable if required to reveal Long Beach tax information to them, that is not truly the case. The process of negotiation in this area makes impossible any consideration of a single year's taxes in isolation from past and subsequent years. Further, the respondents do not deny that by their actions Equitable could be precluded from negotiating settlements it felt to be advantageous.

The withholding of \$110,000 of assets (the certificates of Deposit) from its use causes continuing harm to Equitable, yet the Return makes no mention of this or of the fact that appeal is not available as a remedy for this at all since the respondent judge has made no final order with respect to it.

²²The Return to the Petition states that one of the reasons Long Beach Federal still exists is, "To enable Long Beach Federal to centralize before said respondent District Court any and all litigation connected with or arising from said merger." [*Return and Answer*, 91.]

Finally, respondents apparently concede, for they do not deny, that unless this court orders entry of final judgment this litigation and the resultant series of appeals may never end.

Conclusion.

A peremptory writ of mandamus and prohibition should issue, in the form, and commanding the actions and orders specified at pages 39-40 of the Petition.

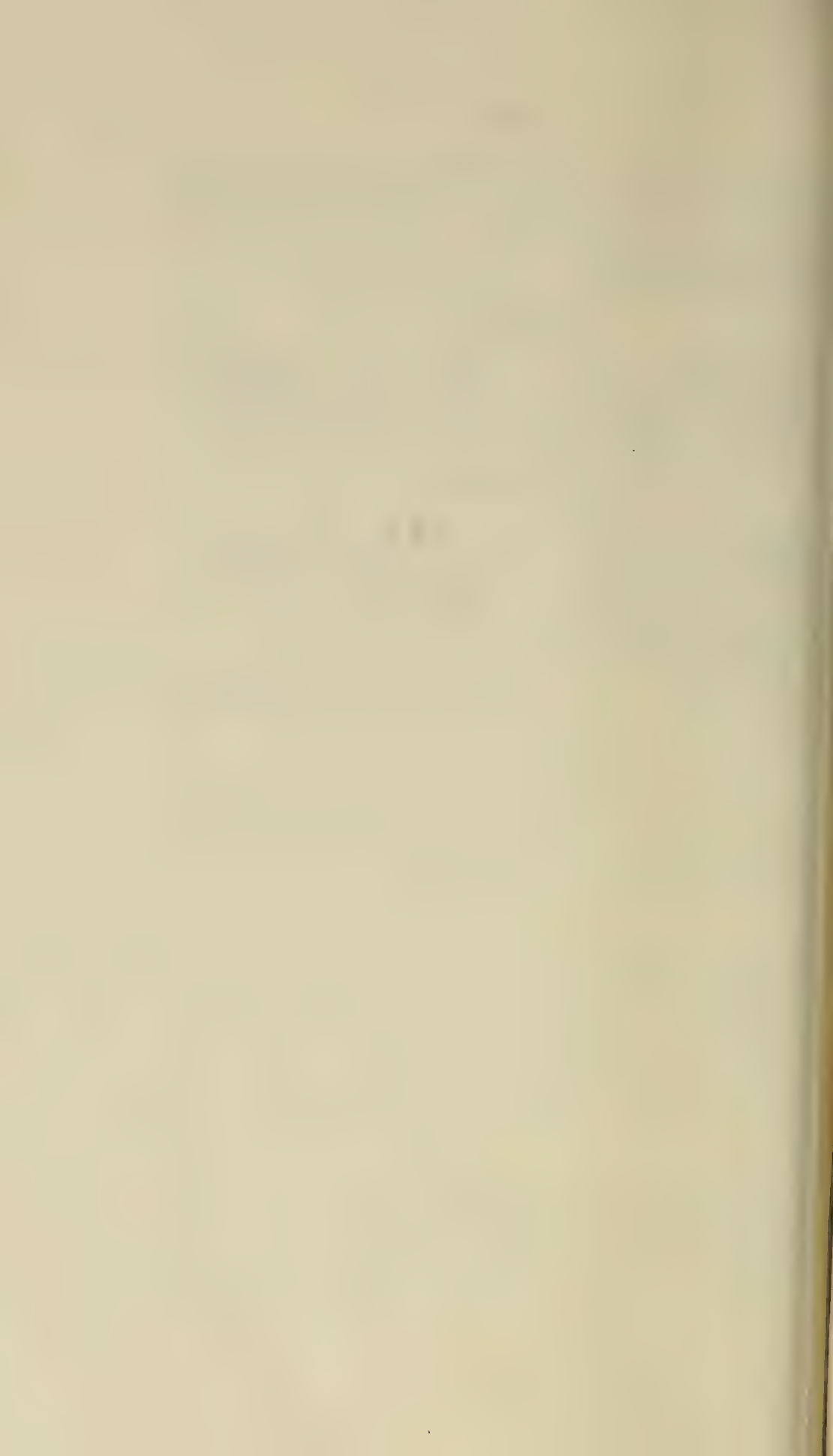
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Certificate.

I hereby certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HERMAN F. SELVIN.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STANLEY DUANE BURDEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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FILED

JAN 1 1968

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STANLEY DUANE BURDEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

On July 7, 1965, appellant was indicted in two counts by the Federal Grand Jury for the Southern District of California, Central Division, for the concealment and sale and facilitation of sale of heroin in violation of Title 21 United States Code, Section 174 [C. T. 2]. ^{1/} Following a court trial before the Honorable E. Avery Crary, United States District Judge, from August 18, 1965, to August 19, 1965, appellant STANLEY DUANE BURDEN was found guilty of both counts.

1/ "C. T. " refers to Clerk's Transcript.

Appellant was convicted and sentenced on September 28, 1965, to the custody of the Attorney General for five years on each count, the sentences to run concurrently [C.T. 15].

Appellant filed, on September 28, 1965, a Notice of Appeal [C.T. 18].

The District Court had jurisdiction under the provisions of Title 21, United States Code, Section 174, and Title 18, United States Code, Section 3231.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

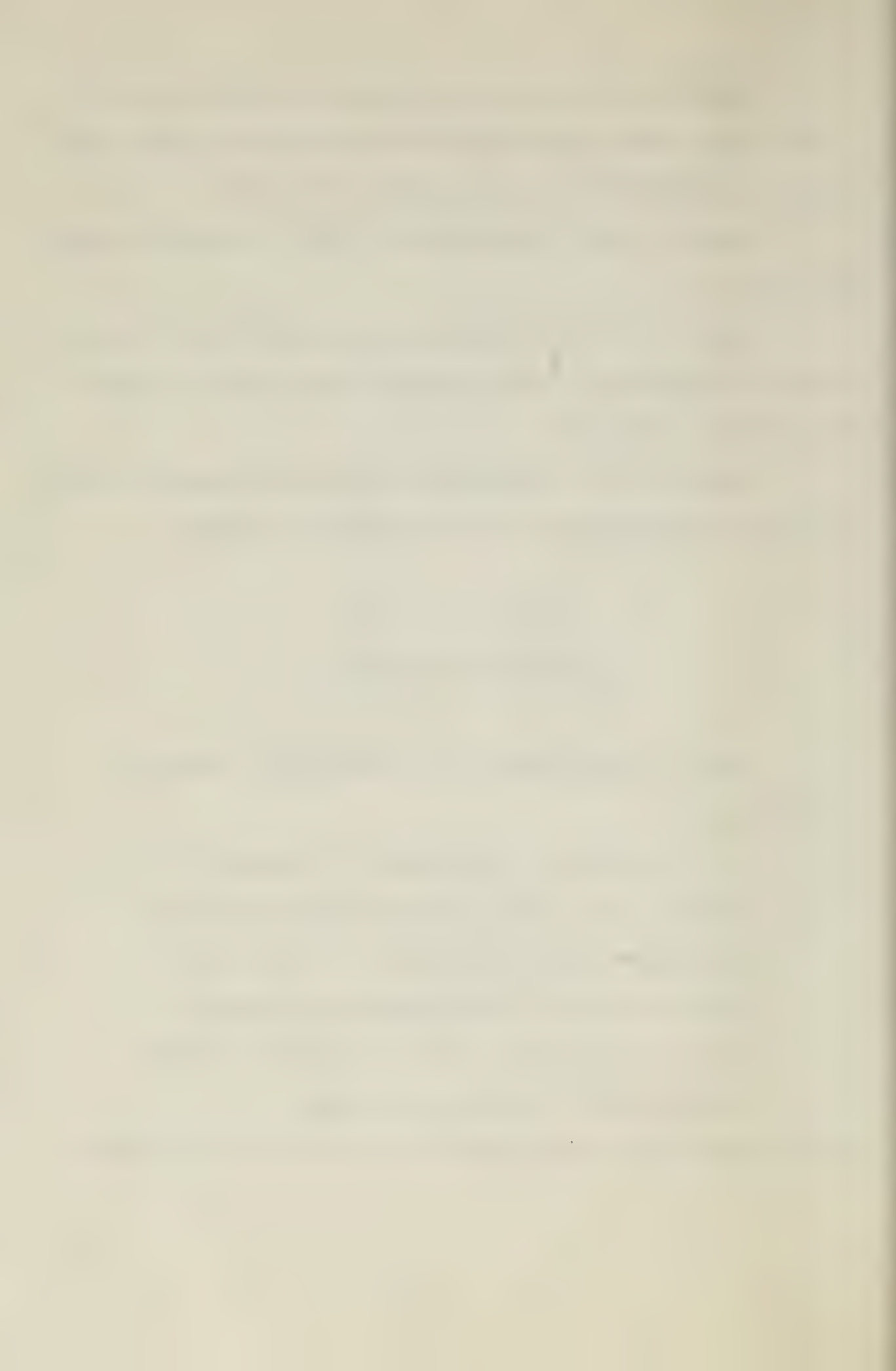
II

STATUTE INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

"Whoever ... knowingly ... receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any ... narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, "

shall be guilty of an offense against the laws of the United States.



III

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to convict appellant.
2. Whether appellant was entrapped.

IV

STATEMENT OF FACTS

On January 25, 1965, an informant of the Federal Bureau of Narcotics placed a call to appellant at appellant's place of employment [R. T. 5]. 2/

The informant told appellant he was interested in purchasing a quarter or half ounce of heroin and asked "if he could make the buy for me" [R. T. 6]. Appellant stated that he would have to call someone, and five minutes later returned the call and stated "he called his connection and that the buy could be made" [R. T. 6-7]. Appellant stated he was leaving work at 5:00 P. M. and the informant stated he would be at appellant's house at 8:00 P. M. [R. T. 7].

At about 7:00 P. M. on January 25, 1965, three agents of the Federal Bureau of Narcotics met the informant at his house and Agent Sergio Borquez searched the informant's person and

2/ "R. T." refers to Reporter's Transcript.

automobile for narcotics and money [R. T. 8]. The search proved negative [R. T. 34]. The informant drove his car to appellant's residence with Agent Borquez in the car [R. T. 8].

Upon meeting with appellant, appellant gave directions as to how to get to Pasadena, California [R. T. 9]. After arriving at the Keg Bar appellant went to phone the connection [R. T. 9]. Appellant returned from the phone, stated "the connection wasn't home" and borrowed the informant's car to see if his connection was home [R. T. 9]. Appellant returned in approximately fifteen minutes and stated the connection was not home [R. T. 10]. After a short time appellant, the informant, and Agent Borquez, proceeded, in the informant's vehicle, to the area of Raymond and Summit Streets in Pasadena, and appellant recognized the source's car in a driveway and said the connection was home [R. T. 10].

After parking the car, the informant handed Borquez \$40.00, Borquez added \$80.00 to the amount, and handed the total to appellant [R. T. 10] after appellant stated, "Give me the money" [R. T. 36-38]. Appellant left the vehicle, with the money, and disappeared around a corner [R. T. 10].

After ten minutes appellant returned with two condoms, handed one to the informant, and kept one in his hand [R. T. 10-11]. The informant then handed one prophylactic, with its contents to Borquez [R. T. 11]. The trio returned to appellant's residence [R. T. 12]. On the way to appellant's residence, appellant stated to Borquez, "Keep it handy, where you can swallow it in case we

get stopped" [R.T. 36-7]. Borquez, during the ride to appellant's residence complained about the weight of the heroin, and appellant stated, "Well, when we get to the apartment I will give you some more" [R.T. 38-9].

Upon returning to appellant's apartment, appellant removed from the second condom some heroin, handed the residue to Borquez, and then injected himself [R.T. 13-14, 39].

Borquez asked appellant how he could get in touch with appellant if he [Borquez] wanted to buy more heroin [R.T. 39-40]. Appellant gave Borquez a card, circled a number on the card, and said, "You can get in touch with me here whenever you want to purchase some more heroin" [R.T. 39-40].

On January 25, 1965, the informant did not tell appellant that he [the informant] needed a "fix," and specifically told appellant that he wanted to buy it for sale [R.T. 29-30].

After the sale on January 25, 1965, Agent Borquez called appellant several times and appellant stated that he had heard Marmolejo [the informant] was working with the police so that he did not want to sell any more heroin to Borquez [R.T. 52].

Appellant testified at the trial, and among other things said that he told the informant on January 25 that he would see if he could find a source where he could "get something" [R.T. 107]. He took the money [R.T. 109]. He testified that there is an understanding among users of narcotics that if one assists in the obtaining of narcotics the buyer will give you a share [R.T. 110]. He also testified that he had obtained heroin from the "connection"

here in the past [R. T. 114].

V.

ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO
SUSTAIN CONVICTION.

The statement of facts, above, shows that an informant called appellant on January 25, 1965, and told him he wanted some heroin for sale. Arrangements were made to meet, and the informant, in the company of an Agent of the Bureau of Narcotics, met with appellant, drove to a location in the area of Pasadena, and the agent gave appellant \$120. Shortly thereafter appellant turned over two prophylactics containing heroin after he had taken some for his own use.

Appellant argues that he was merely the procuring agent of the buyer, and, therefore, cannot be convicted of facilitating the sale or concealment or transportation of heroin. Such is not the law of this Circuit. Both Vasquez v. United States, 290 F.2d 89 (9th Cir. 1961); and Bruno v. United States, 259 F.2d 8 (9th Cir. 1958); stand for the proposition that "facilitation," in its legal meaning, includes the acts committed in the instant case. It is problematical whether this Circuit declines to follow the cases cited by appellant, or politely ignores them, but they are not the law of this Circuit. In United States v. Simons, 374 F.2d 993 (7th Cir. 1966), there appears the following cogent discussion. In

electing to follow the Ninth Circuit in Bruno, supra, the Court said at 995:

"Literally, the first clause of Section 174 covers the importation of narcotics, and the second clause the offense of, among others, the buying and selling of the imported drugs. The third clause effectually covers any other actor in the sale besides the buyer and seller. The clause does not distinguish on which side this actor works.

"It makes no difference therefore whether the middleman . . . is acting for himself or for the buyer or the seller.

"If he makes the sale easier between a seller and a buyer and does so with scienter, he is guilty of a crime. If in order to convict a middleman, it is necessary to prove beyond a reasonable doubt his association with the seller, it seems to us that the efficacy of the facilitation clause of section 174 is nullified. Normally the principal seller in these cases is the faceless, nameless 'connection.' "

B. APPELLANT WAS NOT ENTRAPPED

In reference to the entrapment argued at the trial level, Judge Crary made the following observations at R. T. 177:

"Mr. Marmolejo called Mr. Burden relative to the purchase of heroin. You said he said he needed it. Well, I will assume for the purposes of discussion he did, although I don't recall that he needed it.

"Burden didn't object. He made no pretense or refusal to get the heroin. In fact, I don't think Mr. Burden testified there was any refusal or any pretense or refusal on his part.

"It took no urging by the informer to get Mr. Burden to get the narcotics and to arrange for it. He didn't have any, of course, but he knew where he could get it.

"Mr. Burden, in my judgment, didn't display any unwillingness.

"He gave Mr. Borquez his card and he circled the telephone number on the card, and according to the testimony, as I recall it, Mr. Burden told Mr. Borquez if he wanted more heroin, why, to call him.

"Mr. Burden took a portion of the heroin for himself. That to me does not indicate entrapment."

Appellant argues that the informant said he needed heroin and therefore entrapment occurred. Aside from the observations of Judge Crary, the informant did not say he "needed a fix", but

did state he wanted the heroin for sale [R. T. 29-30]. Of course, on appeal, the informant must be believed, and, therefore, since appellant's statement of "need" is discounted, and also the only evidence remotely supporting entrapment, the issue of fact was properly determined.

VI

CONCLUSION

For the above reasons, the judgment should be affirmed.

Respectfully submitted,

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Nos. 21,869 and 21,870

United States Court of Appeals
For the Ninth Circuit

VALLEY VISION, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,
and UNITED STATES OF AMERICA,

Respondents.

On Petitions to Review Decision and Orders of the
Federal Communications Commission

BRIEF FOR PETITIONER

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and UNITED STATES OF AMERICA,

Respondents.

**On Petitions to Review Decision and Orders of the
Federal Communications Commission**

BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

The petitions for review were filed under the provisions of Section 402 (a) of The Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 U.S.C.A. § 402 (a) (1962) and under Sections 2 and 3 of the Judicial Review Act of 1950, 64 Stat. 1129, 1130 (1950), 5 U.S.C.A. §§ 1032, 1033 (Supp. 1961). Review is sought of the Commission's Order released March 30, 1967, FCC 67-388 in Docket No. 17,171 (Case No. 21,869 herein) and also the Commission's Decision released May 16, 1967, FCC 67-571 (Case No. 21,870 herein).

Petitioner is a California Corporation, incorporated in the State of California, doing business in California, with its principal office located in Modesto, California. The venue of this proceeding is placed in the United States Court of Appeals for the Ninth Circuit, pursuant to Section 3 of the Judicial Review Act of 1950, 5 U.S.C.A. § 1033.

The Respondents herein are the United States of America and the Federal Communications Commission, an administrative agency created by the Communications Act of 1934, and charged with the execution and enforcement of that Act.

In its "Opposition To Motion To Dismiss" filed with this Court on June 16, 1967, Petitioner has set forth in detail the reasons why this Court has jurisdiction to hear and determine the merits of the instant appeals. Rather than repeat the same arguments advanced therein, Petitioner respectfully refers the Court to the aforesaid pleading. In brief, Petitioner established in its "Opposition to Motion to Dismiss" that contrary to Respondents' contention that Section 402 (a) of the Communications Act and Section 2 of the Judicial Review Act vest exclusive jurisdiction in the District of Columbia Court of Appeals in all cases wherein the Commission has issued a cease and desist order against any person, the fact is that Congress gave the District of Columbia Circuit exclusive jurisdiction of only those cases involving either (a) the exercise of the Commission's radio-licensing function; or (b) where the licensee or other party had initiated the action being appealed

from *e.g.*, the denial of a construction permit. It was also established that the Commission did not exercise its radio-licensing function in ordering Petitioner to cease and desist from its lawful operations in Placerville, and that Petitioner had in no way initiated the action being appealed from—indeed the Commission by its letter of November 1, 1966 (R. 15-16)¹ began what has ultimately come to pass. Accordingly, Petitioner exercising the option given it by Section 402 (a) of the Communications Act has decided to lay the venue in the Ninth Circuit as a matter of right.

In addition, it should be noted that Petitioner in the instant appeals is challenging the exercise of that which the Respondents, in their Motion to Dismiss, claim renders this Court without jurisdiction to determine the merits of these cases—the power of the Commission to issue cease and desist orders against persons who are non-licensees of the Commission. Petitioner submits and will demonstrate in Argument II below that the Communications Act of 1934, as amended, does not give the Commission any such power against non-licensees, and that therefore the Commission's cease and desist order against Petitioner was without authority of law and accordingly void. If, as requested, this Court finds that the Commission in fact surpassed its statutory authority and that no valid cease and desist order was issued, then yet another ground exists for bringing the instant appeals in this Court.

¹References are to the page number of the Record as certified to this Court by the Commission on July 11 and August 9, 1967.

STATEMENT OF THE CASE

Placerville, California, is a community of approximately 5,000 persons, situated in the Sierra Nevada Mountains, approximately 40 miles east of Sacramento, California. Due to the mountainous terrain surrounding Placerville, television reception in the community is extremely poor. Accordingly, a Community Antenna Television System (CATV system) is needed in order to receive acceptable television pictures.²

Valley Vision, Inc., is a California corporation originally organized by John J. Markovich, the Vice-President of a Fresno Trailer sales company; Ronald LaForce, a Modesto attorney; Thornton Snider, a lumber dealer; and Robert B. Cooper, a communications engineer. Recognizing the need for a cable television system, Valley Vision, Inc., applied to the city council of Placerville for a franchise to construct such a system. Valley Vision's application was filed on November 9, 1965, and granted November 23, 1965. Application was also made to the Bank of America for a \$120,000 loan to finance the system. Said application was approved on June 22, 1966.

On February 15, 1966, the Federal Communications Commission issued a press release announcing that it planned to adopt new rules to regulate all

²Community Antenna Television System can be defined as any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service.

CATV systems. These rules were not adopted until March 4, 1966, and not released to the public until March 8, 1966. The rules were published in the Federal Register on March 17, 1966, as the Second Report and Order in Docket Nos. 14895, 15791, 31 Fed. Reg. 4540; 6 Pike and Fischer R.R. 2d 1717. In the Second Report and Order, the Commission for the first time adopted rules to regulate CATV systems which receive signals directly off-the-air from television broadcast stations.

In pertinent part, the rules provide that all CATV systems constructed after February 15, 1966, and located within the Grade A contour³ of any television station located within the top 100 television markets, as defined by the American Research Bureau—a private organization engaged in the business of producing and selling television market data and research surveys concerning television viewing habits—may not extend any “distant signal”⁴ beyond the Grade B con-

³“Grade A is one of a trio of ratings according to the strength of a signal. The grades are defined in terms of the level of signal intensity which is required to provide an acceptable signal to 90% of the locations for the following percentages of time: Principal City Grade—90%; Grade A—70%; Grade B—50%.

“The signal, of course, is strongest nearer the point of origination, and becomes progressively weaker as it is removed further from the point of origination. Intervening obstacles such as mountains or other high elevations, poor ground conductivity, or seasonal and other changes in atmospheric conditions can often impair or make impossible good television reception. That area where the signal reception is Grade A is described as being within the Grade A contour.”

Southwestern Cable Co. v. U.S.A. and F.C.C., 378 F. 2d 118 (9th Cir. 1967).

⁴Section 74.1110(i) of the Commission’s Rules defines “distant signal” as the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

tour of the originating station without first obtaining Commission approval after a hearing.

On March 6, 1966, John J. Markovich—who was the founder and most active stockholder of Valley Vision, Inc.—was killed in an airplane crash in Japan. The remaining stockholders of Valley Vision, Inc., thereafter relegated the construction activities of the company to Mr. Cooper—who was the company's President and a Director, but not a stockholder. Mr. Cooper, believing that the Commission's action in purporting to assert jurisdiction over CATV was not a lawful exercise of the Commission's authority, proceeded with construction and completed the Placerville system.

On October 24, 1966, Kelly Broadcasting Company, the owner and operator of Television Station KCRA-TV in Sacramento, California, filed a complaint (R. 1-7) with the Federal Communications Commission in which it contended that Placerville was within the Grade A contours of the Sacramento stations, and requested that the Commission issue an Order to Show Cause, directing Valley Vision, Inc., to show cause why it should not discontinue the carriage of all television signals except those of KCRA-TV and the other Sacramento stations.

On October 27, 1966, Great Western Broadcasting Company, licensee of Television Broadcast Station filed a similar request with the Commission (R. 8-11). In a letter dated November 1, 1966, the Commission requested Petitioner to respond to the charges made

by Kelly and Great Western (R. 15-16). Valley Vision responded to the Commission's letter on November 8, 1966, with a direct challenge to the Commission's authority to regulate CATV (R. 17-19).

On January 11, 1967, Valley Vision filed a "Petition for Waiver" (R. 238-287) asking the Commission to waive its Rules to permit such signals to continue to be carried. In its Petition for Waiver, Valley Vision showed that Placerville does not actually receive a signal of Grade A quality from Sacramento and that if Petitioner were required to discontinue all except Sacramento stations, Petitioner's CATV system would likely be ruined financially and would be forced to discontinue all service, with the consequent loss of all acceptable television reception in the community of Placerville.

On February 17, 1967, the Commission released an Order (R. 20-24) in which it refused to consider Petitioner's request for waiver and, instead, directed Petitioner to show cause why it should not be ordered to cease and desist from carrying "distant" television signals. On March 20, 1967, Petitioner timely filed a Petition for Reconsideration (R. 48-55) of the aforesaid Order to Show Cause. Said Petition for Reconsideration was Denied by an Order (R. 66) released March 30, 1967.⁵ The show cause hearing was held

⁵On May 29, 1967, Valley Vision filed with this Court a "Petition to Review Order of the Federal Communications Commission" which requests the Court to reverse the Commission's action therein under review (Case No. 21,869).

on April 6, 7 and 10, 1967,⁶ on an "expedited" basis. On May 16, 1967, the Commission released a *Decision* (R. 181-189) which ordered Petitioner to cease and desist from the carriage of certain television signals on its CATV system.⁷

Petitioner, on May 29, 1967, requested this Court to review and set aside the Commission's action of May 16, 1967 (Case No. 21,870), and also stay the effectiveness of the Commission's action.⁸ On June 29, 1967, this Court, by Circuit Judges Merrill, Duniway, and Ely granted Petitioner's request for an interlocutory injunction and continued, until a hearing of the cases on the merits, the motion made by Respondents to dismiss Valley Vision's petitions for review.

ASSIGNMENTS OF ERROR

1. The Commission erred in ordering Petitioner to Show Cause why it should not cease and desist

⁶The show cause hearing was initially set to begin on April 18, 1967 (R. 24a). However, in an Order released March 9, 1967 (R. 40), the Chief Hearing Examiner accelerated the commencement date of the hearing to April 3, 1967. This action was subsequently upheld by the Commission (R. 58).

⁷Valley Vision was ordered to cease and desist from the carriage of Television Stations KGO-TV, San Francisco, KTVU, Oakland-San Francisco, KPIX, San Francisco, KRON-TV, San Francisco, KQED, San Francisco, KLOC-TV, Modesto, and KHSL, Chico, California (R. 187). The Commission permitted Valley Vision to continue to carry the signals of the Sacramento television station on its CATV system. (KCRA-TV, KXTV, KOVR and KVIE) (R. 187).

⁸On August 9, 1967 Cases Nos. 21,869 and 21,870 were consolidated by an order of the Court.

from the carriage of distant signals on its CATV system; and erred in ordering Petitioner to Cease and Desist from the carriage of distant signals on its CATV system because:

- (a) The Commission does not possess the statutory authority to regulate or otherwise interfere with the operation of community antenna television systems; and
- (b) The Commission does not possess the statutory authority to issue cease and desist orders against persons who are not licensees of the Commission.

2. Even assuming, solely *arguendo*, that the Commission does possess the statutory authority to regulate CATV systems and also to issue cease and desist orders against non-licensees of the Commission, the Commission's action in ordering Petitioner to cease and desist from the carriage of distant signals on its CATV system was arbitrary, capricious and denied Petitioner procedural due process because it:

- (a) Failed to give adequate notice of the commencement of the hearing;
- (b) Failed to afford Valley Vision a full and fair hearing;
- (c) Failed to provide to Valley Vision sufficient time in which to prepare full and adequate findings of fact and conclusions of law;
- (d) Failed to consider relevant and material evidence;

- (e) Failed to reach a decision consistent with the evidence of record and consistent with its own Rules and Regulations;
 - (f) Failed to abide by its own Rules and Regulations; and
 - (g) Failed to consider and grant Valley Vision's request for a waiver of the Commission's Rules to allow the carriage of distant signals.
-

SUMMARY OF ARGUMENT

This appeal involves a Decision of the Federal Communications Commission which ordered Petitioner to cease and desist from the continued carriage of certain television signals on its CATV system in Placerville, California, for an alleged violation of the Commission's CATV rules. Petitioner challenges the validity of the Commission's action on three grounds.

First, the Commission does not possess the statutory authority to regulate or in any way interfere with the operation of non-microwave CATV systems. In assuming jurisdiction over CATV in 1966, the Commission reversed its 1959 decision which unequivocally and unanimously held that it did not have the statutory authority to regulate CATV. Moreover, on two occasions after that time—1959 and 1961—the Commission unsuccessfully attempted to have Congress specifically amend the Communications Act to give it such regulatory power. In spite of this, the Commission in 1966 claimed the ability to discover

the requisite statutory authority in the very sections of the Act which a previous Commission had disclaimed. This determination by the Commission is nothing more than a usurpation of power because Congress never intended to give the Commission the authority it now claims to have.

Congress created the Commission in 1934 for the express purpose of consolidating into one government agency the power to regulate separate, but related industries. Prior to 1934 the communications common carriers—telegraph, telephone and cable companies—were under the supervision of the Interstate Commerce Commission, whereas the Federal Radio Commission had authority to license radio stations. With the enactment of the Communications Act, both of these powers were vested in the Federal Communications Commission. That Congress did not intend to create a new area of federally regulated activity is clearly established by the legislative history of the Act.

Therefore, if the Commission is to regulate CATV systems, such systems must be either common carriers within the meaning of the Act or require a license from the Commission before commencing operations. The Commission, however, has held the non-microwave CATV systems are not common carriers within Title II of the Act and that licensing of CATV systems is a local function. Therefore, they are not subject to Commission regulation within Title III of the Act. Congress has not given the Commission any other power. Accordingly, its attempt to

regulate the CATV industry is without statutory authority and void.

Second, Petitioner challenges the validity of the Commission's authority to order non-licensees of the Commission to cease and desist from alleged violation of its rules. The Commission has sought to enforce its CATV rules by use of the cease and desist power. The simple fact is, however, that Congress only gave the Commission this power in 1952 so that it might exert more effective control over those whom it licenses. Inasmuch as the Commission does not license CATV operators, it does not have the power to order them to cease and desist from any conduct whatsoever, let alone for a violation of rules which it promulgated without statutory authority.

Third, Petitioner disputes the Commission's action herein appealed because Petitioner was not accorded a full and fair hearing prior to the taking of said action. The Commission had initially given Petitioner one month in which to prepare its defense for the "show cause proceeding". Petitioner relying on this, engaged a professional consulting engineer for the purpose of taking certain measurements which, it was believed, would show that the CATV rules were not applicable to Petitioner's system. The Commission's Chief Hearing Examiner, however, without giving any warning or explanation accelerated the hearing date two weeks. The Commission upheld this decision even though Petitioner pointed out that it would cripple Valley Vision's defense and that his action was in violation of Section 312 (c) of the Communi-

cations Act which requires that 30 days notice be given of all show cause hearings.

At the hearing all of Petitioner's efforts to introduce relevant evidence were bitterly contested by the Commission's Broadcast Bureau—whose appearance at CATV proceedings is not provided for in the Commission's Rules—with the Hearing Examiner in almost all instances granting the Bureau's demands that the evidence be excluded. All Petitioner was attempting to show was that the CATV rules do not apply to its system because Placerville is not located within the Predicted Grade A contour of any of the Sacramento commercial television stations.

Petitioner attempted to support its contention by a method specifically provided for in the Commission's rules which permits such a showing to be made. The Hearing Examiner, however, refused to admit Petitioner's showing into evidence. This ruling by the Examiner was ultimately upheld by the Commission which arbitrarily found the evidence to be irrelevant "... irrespective of its validity." Therefore even though the showing attempted by Petitioner was admittedly valid, the Commission refused to consider it because it would not have led to the result the Commission desired to reach.

Finally, at the completion of the hearing Petitioner was ordered to digest a record of approximately 430 pages and file proposed findings of fact within 7 days even though the Commission's rules allow for a minimum of 20 days. It is clear therefore that these proceedings failed to afford Petitioner even a semblance

of due process, and were manifestly unfair, unjust, and arbitrary.

ARGUMENT

I

THE FEDERAL COMMUNICATIONS COMMISSION POSSESSES NO STATUTORY AUTHORITY TO REGULATE OR OTHERWISE INTERFERE WITH COMMUNITY ANTENNA TELEVISION SYSTEMS

The Federal Communications Commission was created by Congress in 1934 with the enactment of the Communications Act⁹ for the express purpose “. . . of regulating interstate and foreign commerce in communication by wire and radio . . .”¹⁰ The Commission being a creature of Congress only has that authority and power which Congress has seen fit to give it. If the Commission in any way exceeds the statutory powers given to it by Congress its actions are perforce void and without any effect whatsoever.¹¹ As will be demonstrated below, when the Commission assumed jurisdiction over non-microwave CATV systems¹² it exceeded the authority Congress had given it.

⁹In the paragraphs that follow, references to Sections of the Communications Act are not specifically related to the United States Code. It should be noted, however, that Sections 1 through 4 of the Act are Sections 151 through 154 of the Code and all other sections are identically numbered in both the Act and the Code.

¹⁰Section 1 of the Communications Act.

¹¹See, *CAB v. Delta Airlines*, 367 U.S. 316 (1947); *Alaska Airlines v. CAB*, 103 U.S. App. D.C. 225, 257 F. 2d 229 (1958).

¹²In the remainder of this brief any reference to CATV systems will only include the non-microwave or off-the-air type of CATV system where a high antenna is employed to catch broadcast signals. It is conceded that the FCC has jurisdiction over the microwave type of CATV system because it is a rebroadcast into the spectrum.

A. The Commission's Assumption of Jurisdiction in the Second Report and Order is Totally Inconsistent With Prior Commission Views on the Very Identical Question.

The Commission assumed jurisdiction over CATV systems on March 8, 1966, when a bitterly and closely divided (4-3) Commission adopted the Second Report and Order.¹³ In so doing the Commission reversed the unanimous opinion of a 1959 Commission which had unequivocally denied the existence of the statutory authority to regulate CATV systems¹⁴ and which on two previous occasions had unsuccessfully sought the legislation which would have specifically given it the authority which the 1966 Commission claims it always had.¹⁵ The reasons given by the Commission in 1959 for its conclusion that it lacked jurisdiction are just as valid today as they were then. They include the following:

“59. We have no doubt that, as the broadcasters urge, CATV's are related to interstate transmission (regardless of where the station retransmitter is located, the signal often originates, via network, in New York or elsewhere). Therefore it appeared to us that there is no question as to the power of Congress to regulate CATV's, or give the Commission jurisdiction to

¹³31 Fed. Reg. 4540, 6 Pike and Fischer, R.R. 2d 1717 (1966).

¹⁴*In the Matter of Inquiry into the Impact of Community Antenna Systems, etc.*, 26 FCC 403.

¹⁵S-2653, 86th Congress, 1st Sess. (1960) “A Bill to Amend The Communications Act of 1934 to Establish Jurisdiction in the Federal Communications Commission over Community Antenna Systems”. See also S.R. 923, 86th Cong., 1st Sess. (1959). In 1961 the Commission again was unsuccessful in its attempt to have Congress authorize it to regulate community antenna systems. 107 Cong. Rec. 2523, 87th Cong. 1961; Sen. Bill 1044 and H. R. Bill 6864, 87th Cong., 1st Sess.

do so, if it desires. But, as an administrative agency created by Congress, we are of course limited by the terms of the organic statute under which we were created, and must look to that statute to find the extent of our jurisdiction and authority.

* * * * *

“62. *Jurisdiction over CATV's as 'engaged in broadcasting':*

Section 3 (b) of the Act defines ‘radio communication’ as the ‘transmission by radio of writing, signs . . . including all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission’. Section 3(o) defines ‘broadcasting’ as ‘the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations’. Section 3(cc) defines ‘broadcast station’ as a radio station equipped to engage in broadcasting as herein defined.

“63. As for the suggestion that CATV systems are ‘instrumentalities’ within the meaning of Section 3(b) and that therefore (since they are engaged in the distribution of broadcast television programs to these members of the public who reside in locations which the CATV can feasibly reach and who are willing to pay the charge involved) they are engaged, in a sense, in ‘broadcasting’, this would not of itself give us jurisdiction to regulate these systems. Section 301 of the Act provides in general that the operation of any apparatus for the transmission of energy or communications or signals by radio shall be only pursuant to the Act and in accordance with a license issued thereunder, by the Com-

mission. This section clearly does not include the transmission of programs by CATV systems, since such transmission is by wire. We find no basis in definitions contained in Section 3 for the assumption of authority over these systems.

“64. *Regulation under ‘plenary power’ over communications:*

It is urged that we should regulate CATV’s under our ‘plenary power’ over communications. Some parties have cited to us in this connection various subparagraphs of Section 303 of the Act, under which we are empowered to classify stations, encourage the use of radio, make regulations applicable to chain broadcasting, and generally make such rules and regulations, not inconsistent with law, as may be necessary to carry out the Act (subsections (a), (b), (f), (g), (i), (r)). However, we do not believe we have ‘plenary power’ to regulate any and all enterprises which happen to be connected with one of the many aspects of communications.

* * * * *

“69. *Authority to regulate CATV’s because of adverse effect on broadcasting:*

It is urged by some broadcasters (often in connection with assertions made on the basis of Sections 3(b) and 3(o) mentioned above, or the ‘plenary power’ theory) that we should regulate CATV’s because they have a substantial adverse impact upon broadcasting, and tend to thwart what is our mandate under Sections 1, 303 and 307(b), to foster nationwide radio and television service, etc. Cited in this connection are certain Supreme Court decisions dealing with the dairy industry (*United States v. Wrightwood Dairy*

Company, 315 U.S. 110 (1942) and *United States v. Rock Royal Co-op*, 307 U.S. 533). In the *Wrightwood* case the Court held that purely intrastate distribution of milk in competition with interstate commerce is subject to Federal regulation. Likewise, in *Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342, the 'Shreveport case', the Supreme Court held that the Interstate Commerce Commission could act to prevent a carrier from charging a discriminatorily low *intrastate* rate, though that Commission had no jurisdiction over interstate rates as such. In short, it is argued, aside from the fact that CATV's are within some of the definitions of the Communications Act (although their being so makes the argument stronger) we can control them because of their effect upon broadcasting, clearly an interstate business and one which we are instructed to foster and lead to orderly maximum development.

"70. Assuming this concept has legal validity (a point we believe is open to question, and upon which it is unnecessary for us to pass) in order to acquire jurisdiction on this basis, and *a fortiori* in order to utilize it, either in a rule making proceeding or on a case-to-case basis where we could consider whether or not a CATV system should be permitted entry into the field, we would have to make a finding that in a certain situation, or in situations falling within certain limits, there would be a substantial adverse impact on the local station. We have expressed above our inability to determine where the impact takes effect, although we recognize that it may well exist. Accordingly, we would find it impossible, from anything presented to us so far, to make

the necessary finding, either in a particular situation or generally. Moreover, in any event, jurisdiction on this basis would exist, if at all, only in certain situations, and would therefore be a fractional approach to the problem. It is more appropriate to seek certain other specific remedies, discussed later herein. For these reasons we cannot appropriately proceed to regulate or control CATV's on this basis.

“71. In sum, as to Issue No. 11, we find no present basis for asserting jurisdiction or authority over CATV's, except as we already regulate them under Part 15 of our Rules with respect to their radiation of energy.”

In spite of the well reasoned conclusion reached by the 1959 Commission that it lacked jurisdiction, a bare majority of the 1966 Commission found no difficulty whatsoever in finding the requisite statutory authority in the identical sections of the Act in which a previous unanimous Commission, after a more careful consideration of the question, was unable to find any “. . . basis for asserting jurisdiction or authority over CATV's . . .”

That same majority however, within the next few months requested from the 89th Congress what it called “clarifying legislation” with respect to CATV.¹⁶

¹⁶H.R. 13286, 89th Cong., 2nd Sess. (1966). For the Court's convenience the full text of this bill and also the majority and minority reports thereto have been included in a supplement following the appendix. The designation “S-” followed by a page number indicates the page in the Supplement at which the cited material can be found. H.R. 13286 and the committee reports will be found at S-1. Inasmuch as the Congress refused to enact the bill into law the minority reports are of particular importance. These reports are at S-57.

In reality, this was nothing more than a request that Congress amend the Act to reflect what the Commission now contended was there in the first place. In this regard it should be noted that the majority report which accompanied H.R. 13286 clearly refused to agree or disagree with the Commission's action in assuming jurisdiction and left that question for the Courts.¹⁷ Moreover, although the legislation was reported favorably out of Committee, the bill was not enacted into law by Congress. Thus Congress refused to ratify the Commission's position.

To summarize, there has taken place in the short span of seven years the following bizarre and completely contradictory chain of events: a unanimous Commission finding that the Communications Act did not give it the authority to regulate CATV; a request by the Commission that Congress specifically give it the requisite statutory authority; the refusal by Congress to do so; and the brazen assumption of that jurisdiction by a badly split Commission in 1966, with a simultaneous, but unsuccessful, attempt to get Congress to ratify the action it had taken. Is it any wonder that a person in the position of Robert Cooper—the person responsible for building Valley Vision—was, to say the least, confused as to the Commission's fickleness when it came to matters concerning CATV?

Although the Commission is not necessarily bound by its former decisions, it must give some rational

¹⁷S-32.

basis for treating similar situations in dissimilar ways.¹⁸ It is submitted that the Commission actions described above defy any rational explanation. In any event, the Commission's assumption of jurisdiction over CATV cannot be supported by the provisions of the Communications Act, as amended, and its action is therefore void.

B. The Sections of the Act Relied Upon by the Commission Do Not Confer Jurisdiction to Regulate CATV and Were Never Intended by Congress to Do So.

When the Commission adopted its Second Report and Order it attached thereto a memorandum on its jurisdiction and authority. Contained therein is the basis for the Commission's belief that Congress conferred upon it the authority to regulate CATV systems. The pertinent sections of the Act upon which the Commission relies for its jurisdiction are Sections 1, 2, and 3—all of which are found in Title I of the Act which is entitled "General Provisions". In essence the Commission argues that Congress has given it the power to regulate all persons within the United States who engage in interstate and foreign commerce in communication by wire and radio, and that because CATV operators engage in communication by wire and/or radio¹⁹ within the United States, they are subject to the rules, regulations and policies which the

¹⁸*Melody Music v. FCC*, 120 U.S. App. D.C. 241, 345 F. 2d 730 (1965).

¹⁹The Commission appears to be uncertain as to whether CATV is either communication by wire or radio. The Commission, however, believes that it is one or the other. See "Memorandum on Jurisdiction and Authority," in the Second Report and Order, *supra*.

Commission has formulated. The Commission's argument is erroneous because it totally disregards the circumstances leading up to the passage of the Communications Act; because it totally disregards the legislative history of the Act; and, finally, because it distorts the plain language of its provisions.

Prior to the enactment of the Communications Act, there were two separate and distinct government agencies regulating what was then the field of communications. The Interstate Commerce Commission—as part of its authority to regulate interstate commerce—regulated communications common carriers. These included the telephone, telegraph and cable companies *i.e.*, the public utilities. The Federal Radio Commission had authority to license radio stations. In 1934, Congress sought to combine these two separate functions—the regulation of the public utilities (communication by wire) and the licensing of radio stations (communication by radio)—into one agency whose sole concern would be communications. Accordingly, it created the Federal Communications Commission. However, one thing Congress did not intend to do was to create a new area of federally regulated activity. This is made abundantly clear by the Congressional reports which accompany the Act.

Thus, the Senate Committee in its report on the Communications Act stated that the Act contains “. . . many provisions . . . copied verbatim from the Interstate Commerce Act because they apply directly to communications companies doing a common carrier business . . .” The Committee observed that any

departures from the text of the Interstate Commerce Act were only made for the purpose “. . . of clarification in their application to communications, rather than as a manifestation of Congressional intent to attempt a different objective.”²⁰

The House also made clear the objectives contemplated by the Communications Act. Its report states that:

“The communications industry has been subject to disjointed regulation by several different agencies of the Government. The Interstate Commerce Commission has had jurisdiction over common carriers engaged in communication by wire or wireless since 1910, but has never set up any bureau within its organization designed to concentrate on this field. The Radio Commission has had jurisdiction since 1927 over the licensing of radio stations

* * * * *

“It is important to review the legislative history of the regulation of communications by the Interstate Commerce Commission. That body functions under an Act of 1887 which has been many times amended. It was originally created to regulate railroads and still is primarily concerned with the transportation field, but in 1910 an amendment to the Interstate Commerce Act made common carriers engaged in the transmission of intelligence by wire or wireless subject to its jurisdiction. While a series of minor amendments has followed this 1910 legislation the Act never has been perfected to encompass

²⁰S.R. No. 781, 73d Cong., 2d Sess. (1934). (1 Pike and Fischer, R.R. 10:221, 10:222.)

adequate regulation of communications but has really been an adoption of railroad regulation to the communications field. As a consequence, there are many inconsistencies in the demands of the Act and also many important gaps which hinder effective regulation. In this bill the attempt has been made to preserve the value of Court and Commission interpretation of that Act, but at the same time modifying the provisions so as to provide adequately for the regulation of communications' common carriers." H. Rep. No. 1850, 73d Cong., 2d Sess. (1934). (1 Pike and Fischer, R. R. 10:243-10:244.)

Furthermore, the basic construction of the Act itself is further evidence of the Congressional intent to provide only for the regulation of the communications common carriers and the licensing of radio stations. The Communications Act is made up of six titles, four of which could be considered explanatory and miscellaneous (Titles I, IV, V and VI) and two of which deal directly with the scope of the Commission's authority. These latter titles are Title II—"Common Carriers," and Title III—"Provisions Relating to Radio." Title I—"General Provisions"—and in particular Sections 3 (a) and (b) thereof, which defines wire and radio communication has only one purpose and that is to explain and clarify that which Congress has given the Commission the power to do *i.e.*, regulate common carriers and license radio stations. It does not, however, give the Commission the power to regulate an industry, the development of which, no one in 1934 could possibly have foreseen.

The Commission, in its attempt to justify its assumption of jurisdiction purports to construe Sections 3 (a) and (b) of the Act in such a way so as to encompass CATV systems. In so doing, however, it has opened a "Pandora's box" of inexplicable inconsistencies.

Section 3 (a) of the Communications Act defines wire communications as the "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection . . .". Although the Commission claims that CATV systems are included in this definition, the simple fact of the matter is that there are no provisions of the Act which have anything to do with the control and regulation of wire communications systems that are not common carriers within the meaning of the Act. Inasmuch as the Commission has correctly held that CATV systems are not common carriers within Title II of the Act²¹ the only other source of its authority must be found in Title III of the Act which relates to radio.

Section 3 (b) of the Act defines radio communications as the ". . . transmission by radio or writing, signs, signals, pictures and sounds of all kinds . . ." This Section relates directly to Sections 301 and 307 of the Act (Title III) which gives the Commission the authority to license any apparatus for the transmission of energy or communications by radio within the United States. It is well established that the basic

²¹See, *Philadelphia Television Broadcasting Co. v. FCC*, 359 F. 2d 282 (U.S. App. D.C. 1966).

method of regulation that the Commission possesses over radio broadcast stations is the licensing power.²² However, the Commission does not purport to have the authority to license CATV systems which it deems to be a local function.²³ Furthermore, CATV systems do not engage in radio communication or in the transmission of energy; they engage only in wire communication and therefore would only be subject to Commission regulation if they function as common carriers, which they do not. It appears, therefore, that the Commission has answered its own argument because if CATV systems are not common carriers within Title II of the Act and if they do not broadcast or transmit energy, and therefore do not require a license within Title III of the Act, CATV systems are not subject to Commission regulation because Congress has given it no other powers.

C. The Commission Does Not Possess Any Authority to Make Rules Regulating the Operation of CATV Systems.

The inconsistency of the Commission's position is made evident by the sections of the Act it relies upon for the power to make rules regulating CATV systems.

These Sections are 4 (i), 303 (f), 303 (r), and 303 (h). These are the general rule-making provisions of the Act and therefore are only related to those activities which the Commission has been given jurisdiction to regulate. In essence these sections give the

²²*Regents of Georgia v. Carroll*, 338 U.S. 568, 94 L. Ed. 363 (1950).

²³See Second Report and Order, *supra*.

Commission the power to make rules not inconsistent with the Act and also to carry out its provisions. The Act does not give the Commission the authority to regulate CATV. It follows, therefore, that any attempt to make rules which purport to regulate CATV must be without any force whatsoever.

It should be noted that all but one (4 (i)) of the sections relied on by the Commission for its rule-making authority are found in Title III of the Act which is concerned with the licensing of radio and television stations. There is no doubt that Congress intended to give the Commission the authority to make rules which deal with radio and television licensees. However, CATV systems are not radio or television broadcasters nor are they licensees of the Commission. That the Commission's power to make rules within Title III of the Act is strictly confined to the regulation of those whom it licenses or refuses to license was made crystal clear by the Supreme Court of the United States in the *Regents of Georgia v. Carroll*²⁴ case wherein it held that:

“... As an administrative body, the Commission must find its powers within the compass of the authority given by Congress. When to assert its undoubted power to regulate radio channels, Congress set up the Federal Communications Commission, *it prescribed licensing as the method of regulation*. 47 USCA § 307, FCA title 47, § 307. In its action on licenses, the Commission is to be guided by what we have called the ‘touchstone’ of ‘public convenience, interest, or

²⁴338 U.S. 568, 94 L. Ed. 363 (1950).

necessity.' Since the licensee receives no rights in the channel beyond the term of its license, the Commission may grant a license to a competitor even though it results in an economic injury to an existing station. Although the licensee's business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license. Federal Communications Com. v. Sanders Bros. Radio Station, 309 US 470, 475, 84 L Ed 869, 874, 60 S Ct. 693; National Broadcasting Co. v. United States, 319 US 190, 218, 227, 87 L ed 1344, 1363, 1368, 63 S Ct. 997. *These cases make clear that the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions.*"²⁵

As previously stated, CATV systems are not licensed by the Commission, but are licensed by the local authorities. In light of the above quoted precedent the conclusion is inescapable that the rules which the Commission has promulgated pursuant to Title III of the Act should be declared void because they purport to regulate non-licensees of the Commission.

²⁵338 U.S. at 597-99 (emphasis added). See also, *Yankee Network Inc. v. FCC*, 107 F. 2d 212 (U.S. App. D.C. 1939); *Southwest Cable v. USA and FCC*, 378 F. 2d 118 (9th Cir. 1967); and *California Citizens Band Association v. United States*, 375 F. 2d 43 (9th Cir. 1967).

II

**THE FEDERAL COMMUNICATIONS COMMISSION POSSESSES
NO STATUTORY AUTHORITY TO ISSUE CEASE AND DESIST
ORDERS AGAINST PERSONS WHO ARE NON-LICENSEES OF
THE COMMISSION**

Notwithstanding what the Court may find with respect to the jurisdictional question, the Commission erred in ordering Petitioner to cease and desist from the carriage of certain television signals on its CATV system because the Commission does not possess the power to issue cease and desist orders against non-licensees of the Commission. In issuing its cease and desist order, the Commission purported to rely upon Section 312(b) of the Communications Act of 1934, as amended. (R. 189.) Section 312(b) of the Act provides:

“(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.”

That this section was added to the Act in 1952 *solely* for the purpose of enabling the Commission to more effectively control its *licensees* is established, beyond any doubt, by the Congressional Committee Reports which accompanied the amendment of the Act.

The Senate Report explaining the amendment of Section 312 states that:

“This section amends Section 312 of the present Act which deals with revocation of licenses. Under existing law a station license may be revoked for false statements either in the application, or in the statement of fact which may be required from time to time, which would warrant the Commission in refusing to grant a license on an original application; or for failure to observe any of the restrictions or conditions of the Act or regulations of the Commission authorized by the Act or a treaty ratified by the United States. It is clear, therefore, that revocation is the sole administrative penalty in the case of violations ranging from the most serious to the least minor and affecting those who may innocently violate regulations of the Commission on technical matters.

“The committee feels that this is not a satisfactory situation for two reasons: The Commission is reluctant to revoke a license for a minor offense and therefore minor offenses may be committed almost with impunity; and there exists no clear distinction between types of offenses. It is felt that some method of procedure short of revocation should be provided for minor or less serious violations. It is, therefore, provided that the Commission may issue cease-and-desist orders for such less serious violations.

“The revocation penalty would remain in effect only (1) for those situations in which the Commission learns of facts or conditions after the granting of a permit or license which would have warranted it in refusing the grant originally had it known those facts; (2) for violation or failure to observe provisions of a treaty ratified by the United States; and (3) for violation or failure to observe the conditions of any cease-and-desist

order issued in accordance with the provisions of this section. As in the case of cease-and-desist orders, the Commission must first issue an order to show cause why a license should not be revoked.

“The cease-and-desist action would apply to those cases where a licensee has (1) failed to operate substantially as set forth in his license; (2) failed to observe the restrictions of this Act or of a treaty ratified by the United States; and (3) violated or failed to observe any rule or regulation of the Commission authorized by this Act.

“It will be seen that violation of conditions or restrictions of a treaty may be proceeded against initially either by a revocation proceeding or the less onerous cease-and-desist proceeding, thus allowing Commission discretion as to the seriousness of the alleged offense. Moreover, the recommended language clothes the Commission with power to prevent persistent minor violations by making violation of a cease-and-desist order cause for a revocation action.

“The cease-and-desist procedure is a time-tried and wholly successful one in many administrative agencies and the committee believes that its adoption by the Federal Communications Commission will be salutary. The language here recommended has had the approval of all witnesses who testified on the bill.”²⁶

The Conference Report on the addition of 312 (b) of the Act is also clear as to the Congressional intent in giving the Commission the power to issue cease and desist orders:

²⁶S.R. No. 44, 82d Cong., 1st Sess. (1951). (1 Pike and Fischer, R.R. 10:282; emphasis added.)

“Section 11 of the Senate bill proposed to re-write Section 312 of the Communications Act of 1934, and would have modified somewhat the grounds on which the Commission could revoke licenses and added new provisions authorizing the Commission to issue cease and desist orders in certain specified situations.

“The section as it is retained in the conference substitute is the same as the House amendment in so far as the grounds for revocation are concerned, but the provisions which would have authorized the Commission to suspend licenses or to impose forfeitures have been eliminated. *It is believed that the authority to issue cease and desist orders will give the Commission a means by which it can secure compliance with the law and regulations by licensees.* As an alternative to revoking the license in case of failure to obey a cease and desist order, the Commission will be able to invoke the aid of the courts, under Section 401(b) of the Act, to secure compliance. The courts will be able to enforce compliance through their power to punish for contempt.”²⁷

Congress reaffirmed its position in 1960 when in refusing to give the Commission the power of suspension over licensees for violations of the Act and/or the Commission's Rules it stated:

“The obvious purpose for giving the FCC the authority to suspend a license appears to be an effort to provide the Commission with a remedy less drastic than the so-called death sentence—

²⁷H. Rep. No. 2426, 82d Cong., 2d Sess. (1952). (1 Pike and Fischer, R.R. 10:347; emphasis added.)

revocation or failure to renew . . . Your committee is mindful of the fact that 8 years ago the Congress provided the Commission with a remedy additional to the original remedy of revocation and criminal sanctions when it incorporated the cease-and-desist procedures in the Communications Act. *In the conference report on the 1952 amendments to the act it was stated that the authority to issue cease-and-desist orders would give the Commission a means by which it could secure compliance by the licensee with the provisions of the act and with the regulations thereunder.*

“The cease and desist power, however, appears to have been little utilized by the Commission. Indeed until this very year it does not appear to have been utilized by the Commission in the broadcasting field. Yet your committee in its report in 1952 noted the cease-and-desist procedure is a successful one in many administrative agencies. It appears, therefore, that it would be unwise to add the suspension power at this time, particularly because of its impact on the general public, when there is no showing that the cease-and-desist power has not worked. Your committee is still of the opinion that this can be utilized very effectively.

“*We feel that the sanctions now available in the Communications Act, plus the forfeiture penalties herein being provided, give the Commission adequate tools to take effective action against offending licensees without the adverse results that flow from a temporary suspension of a broadcasting facility. Experience may prove that cease-and-desist action and monetary penal-*

ties are not sufficient. If it does, then this committee will act quickly to remedy the situation.”²⁸

The foregoing makes reference to the fact that the cease and desist power had been “. . . little utilized by the Commission” up to 1960. This was indeed true. Up to the issuance of the Second Report and Order in 1966, the Commission had issued cease and desist orders a total of three times.²⁹ Although all of them were issued against non-licensees of the Commission, only one—the last one in 1957—was appealed, to wit: *C. J. Community Services, Inc. v. FCC*, 246 F. 2d 660 (U.S. App. D.C. 1957). And on appeal, the United States District Court for the District of Columbia reversed the Commission. The concurring opinion of Circuit Judge Washington stated at page 665 that:

“Turning to the question of the issuance of the cease and desist order, it seems clear that the Commission misconceived its statutory authority. The provisions for the issuance of cease and desist orders were added to the Communications Act in 1952 . . . to provide the Commission with a sanction less severe than license revocation. See S. Rep. 44, 82nd Cong., 1st Sess. 10 (1951).”

Here, in seeking to enforce its CATV rules against non-licensees by means of the cease and desist power the Commission has once again misconceived its statu-

²⁸S.R. No. 1857, 86th Cong., 2d Sess. (1960). (1 Pike and Fischer, R.R. 10:440; emphasis added.)

²⁹*National Plastik-Ware Fashions*, 9 Pike and Fischer, R.R. 982 (1953); *Prime Incorporated*, 12 Pike and Fischer, R.R. 309 (1955); and *C. J. Community Services, Inc.*, 13 Pike and Fischer, R.R. 1 (1956).

tory role. Accordingly, it is submitted that the cease and desist order which has been issued in the instant case against Petitioner is without statutory authority and therefore void.

As this Court is aware, Respondents have challenged the jurisdiction of this Court to hear and determine the merits of the instant appeals on the grounds that Section 402 (b) of the Communications Act has conferred upon the Court of Appeals for the District of Columbia exclusive jurisdiction in all cases in which a cease and desist order has been issued by the Commission against any person. This contention has been clearly and unequivocally refuted by Petitioner in its "Opposition to Motion to Dismiss" and also in its "Jurisdictional Statement" in this brief.

The Commission's contentions with respect to jurisdiction are an attempt to pull itself up by its own bootstraps. Having attempted without statutory authority to issue a cease and desist order against a person who is not a license-holder and has never subjected himself to the jurisdiction of the Commission, the Commission now asserts that the victim of the worthless cease and desist order must proceed in the Appeals Court of Washington, D.C., which, by the terms of the Communications Act, has been given jurisdiction over certain types of cases involving Commission *licensees*. Even assuming, solely *arguendo*, that the District of Columbia Court might be a suitable forum in which to litigate the validity of a cease and desist order otherwise properly issued against a

Commission *licensee*, it does not follow that the victim of the worthless cease and desist order issued without any statutory authority is precluded from attacking that order in his local federal courts. On the contrary, all of the authorities cited above make it very clear that Congress never intended cease and desist orders to be employed by the Commission against anyone except licensees. Consequently, to the extent that the Communications Act provides that appeals against cease and desist orders may be taken in the District of Columbia Courts, it is clear that Congress was not departing from the basic principle that only licensees of the Commission should be required to litigate in courts situated outside their own local circuits.³⁰

Moreover, entirely aside from the question of the proper venue in which to litigate a cease and desist order, this appeal involves, in actuality two separate appeals: one from the cease and desist order and one from the order, issued by the Commission on February 17, 1967, directing Petitioner to show cause why a cease and desist order should not be issued.

Even if it could be rationally argued that the venue of the appeal from the cease and desist order lies in Washington, D.C.,—and, as demonstrated above, such an argument is wholly untenable—Petitioner must still be found to be properly in this Court on its appeal from the issuance of the order to show cause. For such “show cause” orders are not even mentioned

³⁰See, pp. 3-8 of Petitioner’s “Opposition to Motion to Dismiss.”

in the categories of appeals which the Communications Act permits an appellant to bring in the District of Columbia Circuit.

III

ASSUMING THAT THE COMMISSION DOES HAVE AUTHORITY TO REGULATE CATV SYSTEMS AND DOES HAVE AUTHORITY TO ISSUE CEASE AND DESIST ORDERS AGAINST NON-LICENSEES, THE COMMISSION'S ACTION IN ORDERING PETITIONER TO CEASE AND DESIST FROM THE CARRIAGE OF CERTAIN SIGNALS ON ITS CATV SYSTEM WAS ARBITRARY, CAPRICIOUS, AND DENIED PETITIONER PROCEDURAL DUE PROCESS

Entirely aside from all of the other deficiencies vitiating the cease and desist order in this proceeding, the order was issued after proceedings which failed to afford the Petitioner even a semblance of due process, and which were manifestly unfair, unjust, arbitrary and capricious.

The proceedings before the Commission began when, on February 17, 1967, the Commission released an order, directing Petitioner to show cause why it should not be ordered to cease and desist from carrying certain television signals on its CATV system. The "Order to Show Cause" alleged that the carriage of these signals by Petitioner's CATV system constituted a violation of Sections 74.1105 and 74.1107 of the Commission's Rules, which purport to require CATV systems operating in the so-called "top 100" market to obtain the consent of the Commission to such operation. In determining whether a CATV sys-

tem is located within the "top 100" market, the Rules provide that a determination shall be made whether the community in which the system is located is situated within the "Grade A contours" of a television station situated in one of these markets. If the answer to this determination is affirmative, the Commission considers that the CATV system is located within the market for purposes of its Rules.

The determination whether a particular community is located within the Grade A contour of a particular television station is essentially an engineering matter. Following the issuance of the show cause order, Valley Vision engaged a professional consulting engineer, for the purpose of taking actual field intensity measurements which, it was believed, would show that Placerville was not located within the Grade A contour of any commercial television broadcast station, situated in a "top 100" market.

Immediately after the issuance of the show cause order, the Commission's Chief Hearing Examiner issued an order directing that the show cause hearing be held on April 18, 1967 (R. 24a). Plans were made by Petitioner, looking towards the taking of the requisite field intensity measurements and the preparation of an adequate defense to the "show cause" order, prior to the scheduled hearing date. However, on March 8, 1967, without any warning and without giving any explanation, the Chief Hearing Examiner arbitrarily accelerated the hearing and ordered that it commence instead on April 3, 1967 (R. 40). Valley Vision appealed the Chief Examiner's order to the

Full Commission, pointing out that it would cripple Valley Vision in the presentation of its case (R. 43-47), and pointing out further that the 25 days notice of hearing afforded by the Chief Examiner's action was less than the 30 days required by the statute.³¹ The Commission, however, overruled Valley Vision's protest and directed that it go to hearing as ordered by the Chief Examiner, whether prepared or not (R. 58).

The actual hearing got underway on April 6, the Hearing Examiner having extended it three days to allow counsel to attend an important broadcasters convention. Although Valley Vision was seriously hampered in the presentation of its case by the shortness of time, it nevertheless offered evidence, showing that Placerville is not located within the Grade A contours of any commercial television station situated in a top 100 market (in this case, Sacramento).

Much pertinent and relevant evidence offered by Valley Vision was summarily rejected by the Commission's Hearing Examiner, who repeatedly overruled efforts by Valley Vision to present a complete case. At the very outset of the proceedings, Valley Vision moved to strike the appearance of the Commission's Broadcast Bureau which intervened and participated in the proceedings as an adversary, even though the Commission's Rules do not provide for such intervention (Tr. 2-3). Valley Vision pointed out that it was anomalous for the Commission's

³¹Cf.. Section 312 of the Communications Act.

Broadcast Bureau to appear in the proceedings, especially when the Commission's CATV Task Force made no such appearance. Valley Vision's objections were, however, overruled and the whole proceeding came to be characterized by frequent and lengthy speeches on the part of the Broadcast Bureau and the two participating television stations, objecting to Valley Vision's every attempt to defend itself.

Although Valley Vision had filed a formal written request for waiver of the CATV Rules (R. 238-287), the Hearing Examiner refused to hear any evidence whatsoever directed to such a waiver, notwithstanding the clear requirement laid down by the United States Supreme Court that the Commission must hear proper requests for waivers of its Rules. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). In addition, the Examiner rejected engineering evidence offered by Valley Vision, showing that on the basis of new engineering data just published by the Commission in Docket No. 16004, Placerville was not within the Grade A contours of the Sacramento stations. And the Examiner rejected all attempts by Valley Vision to show the actual measured location of the Grade A contours of the Sacramento stations, on the apparent grounds that the Commission did not care where these contours were actually located.

Following the close of the hearing, Valley Vision requested that it be afforded 20 days time in which to file proposed findings of fact and conclusions of law (R. 425), as provided by the Commission's

Rules.³² Even this fundamental right was, however, denied to Valley Vision, and Valley Vision was directed to file proposed findings of fact and conclusions of law on an expedited basis within 7 days after the conclusion of the hearing. It was manifestly impossible for Valley Vision to complete adequate findings and conclusions, digesting a record of 430 pages within 7 days. Accordingly, Valley Vision was forced to limit its findings and conclusions to "Skeleton Findings and Conclusions" (R. 217-226).

On May 10, 1967, the Commission—with two Commissioners dissenting and one Commissioner absent—issued its decision, purporting to order Valley Vision to cease and desist from the carriage of any television signals except the signals of the Sacramento and Stockton stations. The decision (R. 181-189) shows that the Commission arbitrarily and capriciously refused to even consider the merits of Valley Vision's request for waiver of its Rules.

Moreover, the decision shows the Commission distorted and stretched its own rules in order to find Valley Vision subject to its jurisdiction when, in fact, the Rules themselves exclude from their purview communities such as Placerville, which are not located within the Grade "A" contour of television stations situated in a "top 100 market". Thus, although in cases such as this one where the terrain conditions are irregular, the Commission's Rules provide for the use of alternative methods of computing locations of

³²Section 1.263 of the Commission's Rules and Regulations.

the Grade "A" contour,³³ the Commission refused to allow Valley Vision to avail itself of the alternative coverage prediction methods specified in the Rules. Instead, the Commission insisted that the location of the Grade "A" contours of the Sacramento television stations be determined by a rigid and inflexible engineering procedure which even the Commission left-handedly admits is not really valid where, as here, mountainous terrain is involved.

Indeed, the Commission makes the remarkable statement that "irrespective of its validity, Valley Vision's engineering showing is irrelevant and inadmissible" (R. 185). In other words, while the Commission conceded that Valley Vision's showing of the locations of the Grade "A" contours of the affected television stations was the more accurate showing, the Commission nonetheless stubbornly chose to be guided by the inaccurate showing submitted by its Broadcast Bureau merely because that showing led to the result which the Commission desired to reach. No further comment is required to establish the total unfairness and bias which characterized the Commission's decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Commission's actions herein were arbitrary, capricious and without statutory authority. Accordingly, the Commission's Memorandum Opinion

³³Section 73.684(f) of the Commission's Rules.

and Order which denied Petitioner's request for reconsideration and also its Decision which ordered Petitioner to cease and desist from the carriage of certain television signals on its CATV system should be reversed. Petitioner further requests such other relief as this Court may deem just and proper.

Dated, September 18, 1967.

Respectfully submitted,
 LAUREN A. COLBY,
 GENNARO D. CALIENDO,
Counsel for Petitioner
Valley Vision, Inc.

Of Counsel:

HALLEY, HEAD, LA FORCE & MOORAD.

CERTIFICATE OF COMPLIANCE

We certify that in connection with the preparation of this brief, we have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with these Rules.

LAUREN A. COLBY,
 GENNARO D. CALIENDO.

(Appendix Follows)

Appendix

Appendix

STATUTES AND REGULATIONS INVOLVED

The relevant parts of the statutes and regulations to which references are made in Petitioner's brief follow:

Communications Act of 1934, as amended, 47 U.S.C. §151, *et seq.*

Section 1:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,¹ and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act. (Footnote omitted.)

Section 2(a):

The provisions of this Act shall apply to all interstate and foreign communication by wire or

radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.² (Footnote omitted.)

Section 3(a) (b) :

(a) “Wire communication” or “communication by wire” means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the point of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) “Radio communication” or “communication by radio” means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

Section 4(i) :

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Section 301:

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any such place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United

States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Sec. 302.⁴¹ (Footnote omitted.)

Section 303 (f) (h) (r) :

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however*, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(h) Have authority to establish areas or zones to be served by any station;

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.⁴⁵

⁴⁵(Footnote omitted.)

Section 307 (a):

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act shall grant to any applicant therefor a station license provided for by this Act.

Section 312 (b) (c):

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after

hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

Section 402 (a) (b):

(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

(b) Appeals may be taken from decision and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

Judicial Review Act, 64 Stat. 1129, 5 U.S.C. §§ 1031-1042.

Section 2:

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402 (a) of the Communications Act of 1934, as amended, and (b) of the

Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 309 (e) and 317 of the Packers and Stockyards Act and section 7 (a) of the Perishable Agricultural Commodities Act, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 4 hereof.

Section 3:

The venue of any proceeding under this Act shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any of such parties has its principal office, or in the United States Court of Appeals for the District of Columbia.

Rules and Regulations of the Federal Communications Commission, 47 C.G.R.

Section 1.263:

Proposed findings and conclusions.—(a) Each party to the proceeding may file proposed findings of fact and conclusions, briefs, or memoranda of law: provided, however, that the presiding officer may direct any party other than Commission

counsel to file proposed findings of fact and conclusions, briefs, or memoranda of law. Such proposed findings of fact, conclusions, briefs, and memoranda of law shall be filed within 20 days after the record is closed, unless additional time is allowed.

Section 73.684 (f) :

In cases where the terrain in one or more directions from the antenna site departs widely from the average elevation of the 2 to 10 mile sector, the prediction method may indicate contour distances that are different from what may be expected in practice. For example, a mountain ridge may indicate the practical limit of service although the prediction method may indicate otherwise. In such cases the prediction method should be followed, but a supplemental showing may be made concerning the contour distances as determined by other means. Such supplemental showing should describe the procedure employed and should include sample calculations. Maps of predicted coverage should include both the coverage as predicted by the regular method and as predicted by a supplemental method. When measurements of area are required, these should include the area obtained by the regular prediction method and the area obtained by the supplemental method. In directions where the terrain is such that negative antenna heights or heights below 100 feet for the 2 to 10 mile sector are obtained, a supplemental showing of expected coverage must be included together with a description of the method employed in predicting such coverage. In special cases, the Commission may require additional information as to terrain and coverage.

Section 74.1101 (i) :

Distant signal. The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

Section 74.1105:

No CATV system shall commence operations or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of that station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watt or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into obviously new geographic areas within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or, where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educa-

tional television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under §73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and state educational television agencies, if any. The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence. Where a petition with respect to the proposed service is filed with the Commission, pursuant to §74.1109 of this chapter, within thirty (30) days after notice, new service to subscribers shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; Provided, however, that service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of §74.1107 of this chapter. Where no petition pursuant to §74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of §74.1107. The provisions of this section do not apply to any signals which were being supplied to subscribers of the CATV system on March 17, 1966.

Note 1: As used in §74.1105, the term "predicted Grade B contour" means the field intensity contour defined in §73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in §73.684 of this chapter.

Section 74.1107:

(a) No CATV system operating within the Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such responses or statement may be filed within a twenty (20) day period thereafter. The Com-

mission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under §74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966 to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section; and provided further that no CATV system located in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966 a signal carried beyond its Grade B contour, shall extend its service to new geographical areas where the Commission, upon petition filed under

§74.1109 by a television broadcast station located in the area and after consideration of the response of the CATV system and appropriate proceedings, determine that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, pars. 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. In the event that an evidentiary hearing is held on such petition, the Commission may also consider, upon the basis of the pleadings before it, whether temporary relief pending the outcome of the hearing is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

SUPPLEMENT

HOUSE OF REPRESENTATIVES

89th Congress
2d Session

Report
No. 1635

REGULATION OF
COMMUNITY ANTENNA SYSTEMS

JUNE 17, 1966.—Committed to the Committee of the
Whole House on the State of the Union and
ordered to be printed

MR. STAGGERS, from the Committee on Interstate
and Foreign Commerce, submitted the following

REPORT

[To accompany H.R. 13286]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 13286) to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following: .

That (a) section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof the following new subsection:

“(gg) ‘Community antenna system’ means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service.”

(b) Subsection (h) of such section 3 is amended to read as follows:

“(h) ‘Common carrier’ or ‘carrier’ means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or in interstate or foreign transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna system shall not, insofar as the person is so engaged, be deemed a common carrier.”

SEC. 2. Part I of title III of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

“COMMUNITY ANTENNA SYSTEMS

“SEC. 331. (a) The Commission shall, as the public interest, convenience, or necessity requires, have authority—

“(1) to issue orders, make rules and regulations, and prescribe such conditions or restrictions

with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast services and the provisions of multiple reception services; and

“(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

The Commission shall, in determining the application of any rule or regulation concerning the carriage of local broadcast stations by community antenna systems, give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on March 1, 1966, resulting from the limited channel capacity of any such systems.

“(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

“(c) The Commission shall prescribe such rules and regulations and issue such orders as may be necessary to require the deletion by community antenna systems of signals carrying any professional

football, baseball, basketball, or hockey contest if, after application by the appropriate league, the Commission finds that the failure to delete such signals would be contrary to the purposes for which the anti-trust laws are made inapplicable to certain agreements under Public Law 87-331.

“(d) Nothing in this Act or any regulation promulgated under it shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States except to the extent of direct conflict with the provisions of this Act or regulations promulgated under it.”

PURPOSES OF LEGISLATION

The principal purposes of the legislation are to—

- (1) delineate the scope of the authority of the Federal Communications Commission to regulate CATV systems;

- (2) deny to the Federal Communications Commission the authority to regulate CATV systems as common carriers;

- (3) leave intact the authority of States and local governments to regulate CATV systems except where such regulation is in direct conflict with the Communications Act of 1934, or regulations promulgated thereunder;

- (4) prohibit program origination by CATV systems except where the FCC determines that such origination would serve the public interest;

(5) authorize the FCC to require CATV systems to delete professional team sport programs under certain specified circumstances;

(6) direct the FCC in applying its CATV rules with regard to carriage of local broadcast stations to give due regard to avoidance of substantial disruption of services to subscribers by CATV systems in operation of March 1, 1966, resulting from the limited channel capacity of any such systems.

SECTION-BY-SECTION DESCRIPTION OF THE COMMITTEE AMENDMENT

The bill is reported with an amendment in the nature of a substitute. The following is a section-by-section description of the amendment.

SECTION 1

This section amends section 3 of the Communication Act of 1934 (defining terms used in the act) in two respects.

Definition of "Community Antenna System"

First, it would add to section 3 a definition of the term "community antenna system." As defined, this term means any facility which receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service.

Definition of "Common Carrier"

Second, this section amends the definition of the term "common carrier" in section 3(h) to make it clear that, for the purposes of the Communications Act of 1934, a person engaged in operating a community antenna system would not be deemed a common carrier because of such operation.

SECTION 2

This section adds to part I of title III of the Communications Act of 1934 a new section 331 relating to community antenna systems.

Regulatory Authority of FCC

Subsection (a) of this proposed new section authorizes the Federal Communications Commission, as the public interest, convenience, or necessity requires, (1) to issue orders, make rules and regulations, and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of the Communications Act of 1934, with due regard to both the establishment and maintenance of broadcast services and the provisions of multiple reception services; and (2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

Grandfather Clause

However, the Commission would be required, in determining the application of any rule or regulation concerning the carriage of local broadcast stations by community antenna systems, to give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on March 1, 1966, resulting from the limited channel capacity of any such systems.

Program Origination

Under proposed section 331(b) no community antenna system could transmit over its system any program or other material other than that which it had received directly or indirectly over the air from a broadcast station. However, the Federal Communications Commission could authorize by general rule limited exceptions to this prohibition to permit such transmissions, but this would require an express finding that it would serve the public interest.

Professional Team Sports Contests

The Federal Communications Commission would, under proposed section 331(c), be required to prescribe such rules and regulations and issue such orders as might be necessary to require the deletion by community antenna systems of any professional football, baseball, basketball, or hockey game if, after application by the appropriate league, the Commission found that the failure to delete such game would be contrary to the purposes for which the antitrust laws

are made inapplicable to certain agreements under Public Law 87-331.

Relationship Between Federal, State, and Local CATV Regulation

Proposed section 331(d) provides that nothing in the Communications Act of 1934 or in any regulation promulgated under it shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States except to the extent of direct conflict with the provisions of the act or regulations promulgated under it.

BACKGROUND OF LEGISLATION

This legislation was introduced at the request of the Federal Communications Commission. In the Commission's Second Report and Order issued March 8, 1966, the Commission stated as follows:

152. *Legislative proposals.* . . . We turn now to a brief discussion of the legislative proposals which we believe are desirable.

153. There are four areas which we shall urge to the Congress as particularly warranting its attention:

(i) As we stated in the Notice, we are clearly concerned here with new and important questions of policy and law in the communications field. We therefore state again that we would welcome Congressional guidance as to policy and Congressional clarification of our authority in all respects

in this field. See Notice, par. 31, 1 FCC 2d at p. 465.

(ii) We believe that Congressional consideration of the pay-TV aspects of CATV is particularly called for. For the reasons stated in pars. 128-129, we shall urge that Congress prohibit the origination of program or other material by a CATV system, with such limitations or exceptions as are deemed appropriate. A hybrid CATV-pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals, and such use of the broadcast industry's signals would appear to be both inequitable and inconsistent with the public interest. It is inequitable because it is clearly unfair to use the broadcast industry's product as a basis for wire pay-TV operation which could adversely affect that industry or indeed supplant it. More important, were wire pay-TV to supplant free television broadcast service, it would be inconsistent with the public interest, since it would mean that the public would receive, at least in large part, the same service it now does, but for a fee. Finally, we are considering petitions seeking the authorization of pay-TV in the broadcast spectrum.

(iii) We believe that Congress should consider whether there should be a provision similar to Section 325(a) applicable to CATV systems (i.e., whether, or to what extent, and under what circumstances CATV systems should be required to obtain the consent of the originating broadcast station for the retransmission of the signal by the CATV system). We have described the presently anomalous conditions under which the broadcasting and CATV industries compete. See pars. 131-

138.⁷⁰ Several parties such as NBC have urged that a Section 325(a) approach would obviate the need for much, if not all, of the Commission regulations in this area and would serve the public interest. We are not in a position to state whether a Section 325(a) approach would be effective and fully consistent with the public interest. We think that this is a matter warranting Congressional (and Commission) consideration,

⁷⁰The problem is further pointed up by the recent controversy involving the telecasting of certain of the Notre Dame home or away games by Station WNDU-TV, South Bend, Indiana. See Letter to Mr. Asa S. Bushnell, dated October 28, 1955, Public Notice, dated October 29, 1965, Mimeo 75429. Under the NCAA television regulations, the station was allowed to telecast such games, but permission to do so was temporarily withdrawn because CATV systems, without WNDU-TV's consent, would then pick up the station's signal and carry it to areas not coming within the regulations. The NCAA Television Committee, while it is continuing to study the matter, recently adopted a new regulation stating:

"Any televising privilege granted under Article XIII (a or b), or XV shall apply exclusively to the station or stations specified, and shall be limited to such station or stations. Any extension of such an authorized telecast or its stipulated area of coverage by means of commercial microwave, cable, or community antenna television operation shall be construed as a violation of the rights accorded, and shall preclude favorable consideration of further authorizations of this nature. (Report of the 1965 N.C.A.A. Television Committee, January 10-12, 1966, p. 31)."

Under this unusual situation, the local broadcast station could lose the opportunity to present a program of great interest to its area) as the NCAA plan recognizes in its regulations), because CATV systems over which it has no control carry the program beyond the specified local area (conceivably for hundreds of miles).

Indeed, the anomalous conditions could have an adverse effect on development of new program sources. Multiple owners such as Westinghouse or Metromedia have undertaken some development of new programs; this endeavor promotes the public interest by increasing the programs available and diversifying their sources. But, as Westinghouse points out, the undertaking is a difficult one, which might not be sustained if the programs are brought into the major markets by CATV systems of significant size or impact, thus diminishing or ending the opportunity for the sale of the programs in these markets. The same consideration might be pertinent in the case of the development of a fourth network.

including such aspects as how a "retransmission consent" requirement would function as a practical matter, whether systems in small communities should be dealt with specially, and whether grandfathering is appropriate and the nature of any such grandfathering.

(iv) Finally, Congress will be asked to consider the appropriate relationship of federal to state-local jurisdiction in the CATV field, with particular reference to initial franchising, rate regulation, and extension of service.

The bill, H.R. 13286, was drafted by the Commission to carry out the above legislative recommendations.

The explanation of the bill submitted by the Commission to the Congress may be found in appendix A.

HISTORY OF CATV DEVELOPMENT

CATV systems were first developed as a means of extending TV service into communities which found themselves without any local TV stations when the FCC imposed a freeze on the licensing of television stations. This freeze lasted from September 1948 to July 1952. The first such system was apparently established on a noncommercial basis in Astoria, Oreg., in 1949 to pick up and relay the signal of a Seattle, Wash., station. The first commercial system was established in Lansford, Pa., in 1950.

CATV systems consist of one or several receiving antennas located at some high point near the community to be served. The antennas receive TV signals from one or more stations located outside the com-

munity to be served by the CATV system either directly off the air or by means of microwave relay stations where distances are too great for off-the-air reception. The signals then are amplified and carried by wires or cables to the homes of subscribers. The wires or cables are either owned by the CATV systems and pole space for their placement is rented from telephone companies or utilities, or they are owned by telephone companies and leased by CATV systems.

CATV systems originally provided access to television programs in situations where individual homeowners in remote areas were unable to receive such programs off-the-air by means of rooftop antennas. In furnishing such a service, CATV systems play a role similar to that played by such technical devices as boosters, translators, and satellite stations, and CATV systems have sought to supplant the latter devices.

Subsequently, however, CATV's started up in areas served by one or two local television stations and brought into such areas the signals of distant television stations. Thus, CATVs became instrumental in placing the local station into competition with the distant stations.

In more recent years, the growth of CATV proved to be explosive. By mid-1965, there were approximately 1,800 communities with operating CATV systems serving close to 2 million homes. Some 750 additional communities had franchised CATV systems which were about to be constructed, and in more

than 900 communities applications for CATV franchises were pending.

Additionally, the size of the systems increased as did the channel capacity of the systems. While the older systems had about 5 channels, the more recent systems have 12 channels and systems with even greater channel capacity are being engineered.

The promoters of CATV systems have held out the expectation of wiring up 85 percent of the TV sets in 40 million homes.

Under the circumstances, the Commission felt that the unregulated growth and operation of CATV systems were threatening the orderly development of TV broadcasting as planned by the Congress and the Commission.

LOCAL SERVICE BY COMMERCIAL AND EDUCATIONAL TELEVISION STATIONS

The broad statutory base for the subsequent regulation of television broadcasting was provided by the Congress in 1934 long before the advent of television. Section 1 of the Communications Act of 1934 directs the FCC—

to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communications service.

More specifically section 307 directs the Commission to—

make such distribution of licenses, frequencies, hours of operation, and of power among the sev-

eral States and communities as to provide a fair, efficient, and equitable distribution of radio services to each of the same.

Based upon these congressional mandates, the Commission in 1952 in its Sixth Report and Order assigned commercial and educational VHF and UHF channels to communities throughout the United States. In making the commercial assignments the Commission aimed at reaching several goals in the following order of priority: (A) to make available at least one TV service to all parts of the United States; (B) to provide at least one television station to each community; (C) to make available at least two TV services to all parts of the United States; (D) to provide at least two television stations to each community, and (E) to distribute the remaining frequencies among major population centers.

The basic purpose of this allocation plan was to provide all viewers in the United States with one or more television services, and at the same time to provide as many communities as available spectrum space would permit with one or more local TV stations to serve as media of local self-expression. Much spectrum space could have been preserved if the Commission had sought only to reach the first objective—namely to provide to U.S. viewers television services emanating from a limited number of metropolitan stations instead of from numerous community stations.

During the decade between 1952 and 1962, most of the 681 VHF frequencies assigned by the FCC were

activated. However, only 7 percent of the 1,544 UHF stations assigned by the Commission became operative. In order to speed up the activation of the unused UHF channels, Congress in 1962 enacted all-channel receiver legislation. In passing this legislation, Congress sought to reach two objectives: (*a*) to assure, insofar as possible, that outlets for local self-expression provided for in the Commission's 1952 allocation plan would be activated, and (*b*) in this manner to create a sufficient number of additional stations to make available a full complement of affiliates for each of the three networks and to make possible a fourth national television network.

Also, in 1962, Congress took the step of enacting legislation providing for Federal matching grants for the construction of educational television stations in the hope that such grants would help accelerate the activation throughout the United States of additional educational stations, particularly in the UHF band.

COMMISSION REGULATION OF CATV

In the opinion of the Commission, the orderly development of UHF and VHF commercial and educational TV stations to serve local needs, as envisaged by the Congress and the Commission, was being placed in jeopardy by the unregulated explosive growth of CATV. Therefore, in promulgating in March, 1966, rules applicable to all CATV operations—both off-the-air and microwave—the Commission sought to reach two important objectives: (1) To protect existing and future local stations which can serve as media

of local self-expression from adverse impact of CATV operations and to insure fair competition between CATV operators and broadcasters; and (2) to preclude the development of a system of pay television as a byproduct of unregulated CATV operations.

Being mindful of the justifiable desire of viewers residing in smaller communities to have access at least to all three national network programs, the Commission sought to make the entry into business of CATV's in such situations less difficult than in the case of larger communities where viewers already have access to the three network programs and, possibly, independent local programs, and where new UHF stations are most likely to be activated. This accounts for the difference in treatment by the Commission of CATV's in the top 100 markets.

CONGRESS AND COMMISSION'S CATV RULES

In the course of the committee hearings, a great deal of testimony was presented concerning the CATV rules adopted by the Commission on March 8, 1966, and how these rules differed from the Commission's earlier CATV rules. Conflicting points of view have been presented to the effect that these present rules should be tightened to give better protection to broadcasters or that they should be modified to allow greater freedom of action to CATV systems.

In reporting the instant legislation which delineates the scope of authority of the Commission with regard to CATV regulation, the committee does not attempt to pass any judgment on the reasonableness, adequacy

or inadequacy of the present rules under any and all given factual circumstances. Parties who may feel aggrieved by particular aspects of the present rules have available the traditional administrative and judicial remedies to bring about review, reconsideration, and possibly such modifications as they may be seeking. The instant legislation grants to the Commission broad powers which are sufficiently flexible to permit the Commission to make any adjustment in the present rules and to adopt such new rules as it may deem desirable in the public interest.

GRANDFATHER CLAUSE

In applying any of the rules and regulations concerning the carriage of local broadcast stations by CATV systems, the committee amendment provides that the Commission shall give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on March 1, 1966, resulting from the limited channel capacity of any such systems.

The channel capacity of many of the older and smaller CATV systems is limited to 5 channels in contrast to the more recent and larger systems which usually have 12 channels. The application to systems with limited channel capacity of the Commission's rules requiring the carriage of all local stations could result in depriving subscribers of such systems of program services from distant stations because the capacity of these systems is too limited to transmit the distant signals as well as local signals. It is the pur-

pose of the "grandfather clause" to prevent the disruption of subscriber services in such instances. It is the intent of the committee that this "grandfather clause" be administered by the Commission so as to leave intact services rendered to subscribers by CATV systems with limited channel capacity which were in operation on March 1, 1966.

COMMISSION'S PRESENT REGULATORY AUTHORITY

In its Second Report and Order the Commission stated its conclusion that the present provisions of the Communications Act of 1934 give to the Commission authority to regulate CATV systems.

154. Authority for adoption of these rules is contained in Sections 1, 4(i), 303, 307(b), 308, and 309 of the Communications Act. We wish to stress particularly the provisions of Section 1 that the general purpose of the Act is to "maintain the control of the United States over all the channels of interstate and foreign radio transmission * * * under licenses granted by federal authority"; of Section 303(h), "to establish areas or zones to be served by any station"; of Section 307(b), to make "a fair, efficient, and equitable distribution of radio service" among the several states and communities", Section 303(g), to study new uses of radio and generally encourage the larger and more effective use of radio in the public interest, and Section 303(s), the "all-channel receiver" section. The rules we adopt here, under the rule making power bestowed upon the Commission in Sections 4(i) and 303(r), are designed to "study new uses" and insure future CATV activity and growth consistent with the "larger

and more effective use of radio in the public interest". Indeed, the type of situation here involved is the very reason for the creation of this agency as the history of early chaos in the radio field shows. As the Supreme Court has stated, the Communications Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control a grip on the dynamic aspects of radio transmission" (*FCC v. Pottsville Bctg. Co.*, 309 U.S. 134, 138; see also *NBC v. U.S.*, 319 U.S. 190).

In reporting the instant legislation, the committee does not either agree or disagree with the above conclusions. Test cases are pending at present in the courts. Therefore, the question of whether or not and to what extent the Commission has authority under present law to regulate CATV systems is for the courts to decide in such cases.

It is the considered judgment of the committee, however, that in order properly to regulate broadcasting and communications in the United States the Commission should have the broad powers which the instant legislation would confer upon the Commission to regulate CATV systems.

The Commission in 1962 held that it had authority to regulate CATV operations which required microwave transmission for the purpose of bringing to the CATV system television signals too far removed to be received off the air. In the *Carter Mountain* case, the courts in 1963 upheld the Commission's authority in this respect and in the following years grants of microwave licenses were conditioned to secure car-

riage of local stations by CATV systems and to preclude duplication of local TV programs by distant signals imported by CATV systems.

In 1966, the Commission extended its regulation to off-the-air CATV systems and at the same time modified the carriage and nonduplication requirements to be observed by all CATV systems.

EARLIER CONSIDERATION OF CATV LEGISLATION

In 1959 (86th Cong., 1st sess.), after extended hearings on the subjects of boosters, translators, satellites and CATV's the Senate Committee on Interstate and Foreign Commerce reported legislation (S. 2653) providing for the licensing of CATV systems by the Federal Communications Commission (S.Rept. No. 923, Sept. 8, 1959).

The committee pointed to the responsibility imposed upon the Commission by the Communications Act of 1934 to make available, as far as possible, to all the people of the United States, an efficient, nationwide, radio communications service and to make such distribution of facilities among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of them.

The committee noted that in carrying out this mandate, the Commission in 1952 in its sixth report and order had assigned television frequencies to over 1,250 communities. The committee stressed that in making these allocations, the Federal Communications Commission had followed certain principles in terms of priorities. The first priority was to provide

at least one television service to all parts of the United States. The second priority required the provision of at least one television broadcast station to each community.

The Committee urged the adoption of CATV licensing legislation because it was the committee's view that—

there should be no weakening of the Commission's announced goal of local service * * *. Unrestrained CATV, booster, or translator operation might eventually result in large regions, or even entire States, being deprived of all local television service—or being left, at best, with nothing more than a highly limited satellite service * * *. The undesirable economic, cultural, political, and social consequences of making Montana and northern Idaho tributary to Spokane, southern Idaho dependent upon Salt Lake City, and Wyoming and western Nebraska mere adjuncts to Denver should be so clear as to require no elaboration. There are similar possibilities with respect to other parts of the United States.¹

The committee stressed particularly the need for protecting television stations in single-station markets from the impact of CATV operations.

In urging the adoption of legislation providing for the licensing of community antenna television systems, the committee emphasized:

It must be clearly recognized that the operations of community antenna systems are so inter-

¹S. Rept. 923, pp. 7-8.

twined with the rest of the television system and have such serious potential impact upon the other elements in the overall complex of television service that CATV competition does have an effect on the orderly development of television.²

The Senate considered the legislation and after lengthy debate by a vote of 39 to 38 (23 Senators not voting) voted to recommit the bill, S. 2653, to the Committee on Interstate and Foreign Commerce.

While the bills dealing with the CATV regulation were introduced during subsequent sessions until the 89th Congress no hearings were held on such bills either in the Senate or in the House of Representatives.

COMMITTEE HEARINGS AND CONSIDERATION

The committee held 4 days of hearings in 1965 and 6 days of hearings in 1966 on the subject of CATV legislation and regulation. In the course of these hearings testimony was presented by the Government, broadcast, and CATV witnesses.

Subsequently, the committee conducted nine executive sessions to go over the testimony and legislative recommendations which were presented to the committee.

The committee knows of no legislation which has received more careful and minute study and deliberation than the instant legislation.

²Supra, p. 8.

CONSENT OF BROADCAST STATIONS TO CATV TRANSMISSION OF BROADCAST SIGNALS

The committee has considered the question raised by the Commission in its legislative recommendation of whether section 325 of the Communications Act should be amended so as to prohibit transmission by CATV systems of any broadcast signals except with the express authority of the broadcast stations. In view of the pendency of copyright legislation it is the view of the committee that the recognition and protection of any property rights in programs broadcast by radio and television stations should more appropriately be determined within the framework of copyright legislation rather than within the framework of communications legislation. Therefore, the committee decided against amending section 325 so as to require CATV systems to secure the consent of broadcast stations for the transmission of broadcast signals.

CONCLUSIONS

On the basis of the hearings and the executive sessions, your committee has reported an amended bill which it believes is in the public interest. Under the provisions of the bill, the Commission has broad authority to regulate CATV operations in a manner which will dovetail with achieving the dual purposes for which television plans have been developed by the Congress and the Commission—to give viewers access to multiple TV programs, and at the same time, to provide for the activation and continued operation of the largest possible number of local com-

mercial and educational television stations capable of serving community needs.

The achievement of these objectives requires a careful balancing of considerations in the promulgation of CATV rules and in their administration. Whether or not a local TV station actually serves community needs is a question of fact which will have to be determined by the Commission in individual cases whenever such cases arise.

It is the purpose of the legislation to serve the broad interests of the American people with regard to television broadcasting and not to protect one type of business activity from the competitive impact of another type of business activity.

It will be the task of the Commission in issuing rules and in adjudicating individual cases to determine what best meets the broad public interest with regard to television broadcasting and the instant legislation is intended to assure that the Commission has authority sufficiently broad properly to perform this difficult task.

AGENCY REPORTS

The report submitted by the Department of Justice may be found in appendix B.

No report was submitted by the Federal Communications Commission since the Commission requested introduction of this legislation. The Commission's explanation of the bill may be found in appendix A.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

COMMUNICATIONS ACT OF 1934

* * * * * * *

TITLE I—GENERAL PROVISIONS

* * * * * * *

DEFINITIONS

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

* * * * * * *

(h) “Common carrier” or “carrier” means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or in interstate or foreign [radio] transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting *or in operating a community antenna system* shall not, insofar as [such] *the* person is so engaged, be deemed a common carrier.

* * * * * * *

(ff) “Great Lakes Agreement” means the Agreement for the Promotion of Safety on the Great Lakes

by Means of Radio in force and the regulations referred to therein.

(gg) *“Community antenna system” means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service.*

* * * * *

TITLE III—PROVISIONS RELATING TO RADIO

PART I—GENERAL PROVISIONS

* * * * *

PROHIBITION AGAINST SHIPMENT OF CERTAIN TELEVISION RECEIVERS

SEC. 330. (a) No person shall ship in interstate commerce, or import from any foreign country into the United States, for sale or resale to the public apparatus described in paragraph (s) of section 303 unless it complies with rules prescribed by the Commission pursuant to the authority granted by that paragraph: *Provided*, That this section shall not apply to carriers transporting such apparatus without trading in it.

(b) For the purposes of this section and section 303(s)—

(1) The term “interstate commerce” means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States and any place outside thereof which is within the United

States, (B) commerce between points in the same State, the District of Columbia, the Commonwealth of Puerto Rico, or possession of the United States but through any place outside thereof, or (C) commerce wholly within the District of Columbia or any possession of the United States.

(2) The term "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States, but does not include the Canal Zone.

COMMUNITY ANTENNA SYSTEMS

SEC. 331. (a) *The Commission shall, as the public interest, convenience, or necessity requires, have authority—*

(1) *to issue orders, make rules and regulations, and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast services and the provisions of multiple reception services; and*

(2) *to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.*

The Commission shall, in determining the application of any rule or regulation concerning the carriage of

local broadcast stations by community antenna systems, give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on March 1, 1966, resulting from the limited channel capacity of any such systems.

(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

(c) The Commission shall prescribe such rules and regulations and issue such orders as may be necessary to require the deletion by community antenna systems of signals carrying any professional football, baseball, basketball, or hockey contest if, after application by the appropriate league, the Commission finds that the failure to delete such signals would be contrary to the purposes for which the antitrust laws are made inapplicable to certain agreements under Public Law 87-331.

(d) Nothing in this Act or any regulation promulgated under it shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States except to the

extent of direct conflict with the provisions of this Act or regulations promulgated under it.

For the convenience of Members of Congress the provisions of Public Law 87-331 are set out below:

AN ACT TO amend the antitrust laws to authorize leagues of professional football, baseball, basketball, and hockey teams to enter into certain television contracts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the antitrust laws, as defined in section 1 of the Act of October 15, 1914, as amended (38 Stat. 730), or in the Federal Trade Commission Act, as amended (38 Stat. 717), shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

SEC. 2. Section 1 of this Act shall not apply to any joint agreement described in section 1 of this Act which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home.

SEC. 3. Section 1 of this Act shall not apply to any joint agreement described in section 1 of this Act which permits the telecasting of all or a substantial part of any professional football game on any Friday after six o'clock post-meridian or on any Saturday during the period beginning on the Second Friday in September and ending on the second Saturday in December in any year from any telecasting station located within seventy-five miles of the game site of any intercollegiate football contest scheduled to be played on such a date if—

(1) such intercollegiate football contest is between institutions of higher learning both of which confer degrees upon students following completion of sufficient credit hours to equal a four-year course, and

(2) such intercollegiate football contest and such game site were announced through publication in a daily newspaper of general circulation prior to March 1 of such year as being regularly scheduled for such day and place.

SEC. 4. Nothing contained in this Act shall be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the anti-trust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreements to which section 1 of this Act shall apply.

SEC. 5. As used in this Act, "persons" means any individual, partnership, corporation, or un-

incorporated association or any combination or association thereof.

SEC. 6. Nothing in this Act shall affect any cause of action existing on the effective date hereof in respect to the organized professional team sports of baseball, football, basketball, or hockey.

APPENDIX A

FEDERAL COMMUNICATIONS COMMISSION'S EXPLANATION OF PROPOSED AMENDMENTS TO THE COMMUNICA- TIONS ACT OF 1934, AS AMENDED, CONCERNING REG- ULATION OF COMMUNITY ANTENNA SYSTEMS

These proposals for amendments to the Communications Act are submitted pursuant to the Commission's determination, announced in its Public Notice of February 15, 1966, that it would make the following recommendations for legislation to the Congress:

(a) Clarification and confirmation of FCC jurisdiction over CATV systems generally, along with such specific provisions as are deemed appropriate.

(b) Prohibition of the origination of program or other material by a CATV system with such limitations or exceptions, if any, as are deemed appropriate.

(c) Consideration of whether, to what extent, and under what circumstances CATV systems should be required to obtain the consent of the originating broadcast station for the retransmission of the signal by the CATV system.

(d) Consideration of whether CATV systems should or should not be deemed public utilities.

In this connection, Congress will be asked to consider the appropriate relationship of federal to state-local jurisdiction in the CATV field, with particular reference to initial franchising, rate regulation, and extension of service.

The Commission has determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate.

The proposed new subsection 3(h) of the Communications Act broadly defines a "community antenna system" to include any facility which receives broadcast signals¹ over the air² and distributes them by means of wire or cable to subscribing members of the public. While the definition is all-inclusive, we believe it is unnecessary to impose regulations on all systems. Therefore the proposed new section 331(a)(2) would empower the Commission to exempt from regulation, by general rule, systems, which, because of their size or nature, need not be encompassed within the regulatory scheme. For example,

¹Both radio and television signals are included. While we are aware of no community antenna system which now distributes only radio signals, some systems do distribute signals from both radio and television broadcast stations.

²This would include signals received directly off the air from a broadcast station, as well as those broadcast and then relayed by means of a microwave relay system.

the Commission's present regulations exempt systems serving fewer than fifty subscribers or which serve only one or more apartment houses under common ownership, control or management. See, e.g., 47 CFR 21.710(a).

Of prime importance is the proposed new section 331(a)(1) of the Act, which would expressly confer upon the Commission, in broad and comprehensive terms, authority to regulate community antenna systems in the public interest. This authority is to be exercised only to the extent necessary to carry out the purposes of the Communications Act, particularly the establishment and maintenance of broadcast services and the provision of multiple reception services. There is thus a Congressional recognition of the public service rendered by the broadcast and CATV industries and a directive to promote the orderly growth of both industries.

We recommend the broad approach along the lines of proposed section 331 (a)(1) because of the dynamic and relatively new nature of the CATV field. We believe that it would be difficult and indeed impracticable to attempt to delineate precisely in a statute all of the possible areas in which the public interest may in the future require Commission action. Had legislation been drawn to deal specifically with the problems posed by CATV in the fifties, it would have been inadequate as to such present problems as those raised by CATV entry into the major markets. Today, for example, because there is so little program origination or alternation or deletion of broadcast

signals being carried, there would appear to be few, if any, problems concerning the carriage over CATV systems of political broadcasts or of appropriate identification announcements with respect to sponsored material, including programs involving controversial issues. But their could be future problems in these respects, requiring regulation along the lines of sections 315 or 317. The broad regulatory approach we urge is similar to that adopted by the Congress for regulation of radio, and the following quotation from the landmark Supreme Court case construing the Communications Act is equally pertinent to the dynamic and new field of CATV:

* * * Congress was acting in a field of regulation which was both new and dynamic * * * While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved (*NBC v. U.S.*, 319 U.S. 190, 218-219).

There is one area which we believe that Congress may wish to consider specifically at this time, rather than leaving to subsequent regulatory decision under the proposed section 331(a)(1)—namely, whether community antenna systems should be required to obtain the consent of the originating broadcast station before retransmitting the station's signal over the system. It has been urged that such a requirement would obviate the need for much, if not all, of the Commission's present regulations in this field. The Commission is not now in a position to state whether a so-called section 325(a) approach would be effective or fully consistent with the public interest. The matter is one of such a nature that we believe it should be more appropriately considered by the Congress. In this way, there could be Congressional hearings on how such a retransmission consent provision would function as a practical matter, whether there should be special provisions for the CATV systems operating in a small community, and whether and to what extent there should be "grandfathering" of existing systems. The statute finally enacted could then reflect the Congressional judgment on this important aspect.

The proposed new section 331(b) of the Communications Act deals with the question of possible program origination by community antenna systems. We believe it would be inequitable to allow unlimited program origination since, this would permit community antenna systems to use the distribution of free television broadcast signals as a base for engaging in

pay-TV operations.³ Moreover, the Commission, and indeed the Congress, has had a continuing concern with the possible impact of subscription television service on the free television broadcast service. The Commission currently has before it a petition requesting the institution of rule making proceedings to provide for subscription television service on a permanent and carefully regulated basis throughout the country utilizing the facilities of television broadcast stations. Because of the foregoing considerations, the proposed section 331(b) would bar any general pay-TV operation by a community antenna system.

While convinced that community antenna systems should not be permitted unlimited program origination, we are not recommending that Congress impose a complete ban on program origination. There would appear to be various possible exceptions (e.g., the fairly common time and weathercasting channels on CATV systems; see also par. 57 of our *Notice of Inquiry and Notice of Proposed Rule Making*, Docket No. 15971, 1 FCC 2d 453, 474-75). The scope of such possible exceptions to the ban could only be determined after appropriate proceedings. Because of the importance of the matter, we would suggest that Congress, upon the basis of its hearings, resolve this question and enact specific statutory guidelines.

³Specific charges to subscribers for programs originated by a community antenna system could, of course be barred, but it might be difficult to insure that monthly rates charged to subscribers were not being set at a level which would take into account programs originated by the system, particularly in the case of a new system.

Absent such Congressional guidelines, the Commission recommends that Congress follow the approach set out in the new section 331(b). The proposed section 331(b) in addition to barring program origination by community antenna systems, would permit the Commission to grant exceptions subject to several limitations. An express finding would have to be made, after appropriate proceedings, that an exception would serve the public interest; it could be granted only by general rule; and no additional charge to subscribers would be permitted under any exception granted.

Finally, the Commission believes that Congressional consideration should also be given to the appropriate relationship of federal to state-local jurisdiction over community antenna systems, particularly with regard to initial franchising, rate regulation and related matters. The Commission generally has not proposed to exercise any jurisdiction with respect to these matters. (See par. 32, *Notice of Inquiry* and *Notice of Proposed Rule Making*, Docket No. 15971, 1 FCC 2d 453, 466). Rather, it has recognized that many local governmental bodies, usually in connection with the grant of franchises, have asserted some jurisdiction with respect to rates charged subscribers and similar matters. At least three states (Connecticut, New Jersey, and Rhode Island) have held that CATV systems are public utilities.

In our opinion, the public interest will best be protected by permitting state and local regulation to continue with regard to those matters not regulated

by the Commission. We are therefore recommending legislation along the lines of the proposed section 331(c). That section provides that there would be no federal preemption except to the extent of direct conflict with the provisions of the Communications Act or regulations enacted by the Commission. This would permit state and local action, but would not foreclose federal action to carry out the purposes of the Act and to promote the "public interest in the larger and more effective use of radio" (sec. 303(g)), where such action becomes necessary.

Adopted March 2, 1966.

Attachments:

Dissenting statement of Commissioner Robert T. Bartley.

Separate statement of Commissioner Lee Loevinger.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I believe that telling the public it cannot receive broadcasts it wants and is willing to pay for via CATV is unsound public policy.

People willing to pay extra should be allowed to bring in broadcasts which they would not otherwise receive as well or not at all.

Conditions which the Commission would impose on CATV as to carriage, non-duplication and procedural impediments to development in the top 100 markets appear to be for the economic protection of television

stations. Experience indicates that economic protection begets more regulation.

The heart of concern over CATV is its possible evolution into pay television. Fear has been expressed that the community antenna systems will be built and made viable by using free broadcasts from television stations; then, after the systems have acquired a sufficient number of subscribers, they could afford to originate their own programs, and pay television would result.

Consideration need be given to the existing types of systems, (1) community antenna systems which receive, and distribute to subscribers, transmissions of broadcast stations, and (2) closed-circuit systems which originate their own special programming and distribute it by wire or cable to theatres, business establishments or homes of subscribers.

I believe we should not discourage closed-circuit systems built and made viable by distributing their own programs.

It is the mixing of the two types of systems which would give rise to an unfair competitive advantage. It would be inequitable to allow program origination since this would permit community antenna systems to use the distribution of free television broadcast signals as a base for engaging in pay television operations.

Accordingly, at the present time, I would recommend the following legislation, limited to prohibiting program origination by community antenna systems:

Section 3(hh) [Definition]: Community antenna system means a facility which receives any programs transmitted by a broadcast station and distributes such programs by wire or cable to customers paying for the service.

Section 331: No community antenna system shall distribute programs other than those received from transmissions by broadcast stations.

SEPARATE STATEMENT OF COMMISSIONER LEE LOEVINGER
REGARDING PROPOSED CATV LEGISLATION

I believe it is necessary for Congress to legislate on the subject of Community Antenna Television and that the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under present statutes the Commission does not have the jurisdiction which it claims over CATVs. See my separate opinion at 4 RR 2d 1679, 1712. If the Commission is to act in this field legislative authorization is, therefore, necessary.

In general I agree with the views expressed by Commissioner Bartley in his dissenting statement. However, those views are more relevant to consideration of the regulations that may be promulgated by the Commission under the proposed legislation than to the bill now proposed. The legislation proposed is basically a broad authorization to the FCC to act in this field, with a specific declaration that Congressional action shall not be construed as Federal preemption. It would be desirable for Congress to es-

tablish more specific standards for administrative action than are contained in the proposed bill. But it is appropriate for Congress to delegate broad authority for the Commission to act under whatever standards Congress may see fit to establish. Accordingly I join in recommending that Congress consider the proposed bill submitted herewith and enact legislation in such form as may best express the Congressional view of the proper way to deal with the problems involving FCC jurisdiction to regulate CATV systems, the operation of CATV systems, the relations of CATV systems to conventional broadcasting stations, and the relation between Federal and State jurisdiction in this field.

APPENDIX B

AGENCY REPORTS

DEPARTMENT OF JUSTICE,

Washington, D.C., June 17, 1966.

Hon. HARLEY O. STAGGERS,

*Chairman, Committee on Interstate and Foreign
Commerce,*

House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 13286, a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with re-

spect to community antenna systems, and for other purposes.

The principal purpose of the bill is to clarify and confirm the Commission's jurisdiction over community antenna systems in order that the Commission shall have clear authority to integrate community antenna service into the national broadcast structure in such a way as to promote maximum service to everyone, including both those persons who are dependent upon off-the-air service and those who may receive cable service. The considerations which underlie the proposed legislation are described in detail in the Commission's report and order of March 8, 1966, in FCC docket Nos. 14895 and 15233, 31 F.R. 4539, March 17, 1966. The question of the Commission's present jurisdiction, as it applies to community antenna systems, is discussed beginning at 31 F.R. 4543.

The bill consists of three principal substantive provisions. First, it would specifically authorize the Commission to issue orders, make rules and regulations, and prescribe conditions and restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, with authority to exempt certain types of systems, in whole or in part, because of their size or nature. Second, it would bar program origination by such systems, but would permit the Commission to grant exceptions to the prohibition, where appropriate. Finally, it would preserve State and local jurisdiction over such systems "except to the extent of direct conflict with this Act or regulations promulgated hereunder."

Section 313 of the present act (48 Stat. 1087, 47 U.S.C. 313) declares the antitrust laws to be applicable to the manufacture and sale of radio apparatus and to "interstate or foreign radio communication." The bill does not propose to define the term "community antenna system" specifically in terms of radio communication. Although regulation of such systems by the Commission would not appear to confer antitrust immunity (see *United States v. Radio Corporation of America*, 358 U.S. 334 (1959)), the Department of Justice is of the view that it would be desirable to eliminate whatever doubt there may be with respect to systems which rely only upon cable transmission by adding a provision to the bill which would provide expressly that all community antenna systems are within the declaration of section 313.

Apparently through error, the last subsection added to the present section 3 of the act was designated subsection "(ee)" when it should have been "(gg)." The next subsection to be added, therefore, should be "(hh)," and the bill should be changed accordingly.

We generally favor the confirmation by Congress of the jurisdiction the FCC has recently asserted over community antenna systems in order that the Commission shall have adequate authority to integrate community antenna service into the national broadcast structure. We do not take any position on the questions of specific aspects of community antenna service regulation. The community antenna service industry is a rapidly expanding and ever-changing one having significant competitive implications, par-

ticularly with respect to television broadcasting, and the questions which may arise in the course of its future development cannot be foreseen with precision.

We think that the proposal to grant jurisdiction to the FCC constitutes a reasonable and correct approach to the community antenna service question. The bill's general grant of authority, unencumbered by attempts to deal by statute with specific details of regulation, would afford the FCC the latitude necessary to fashion rules adapted to conditions in a developing field. It is for this reason that we support the primary purpose of the legislation but express no view on the other questions as to which the FCC has asked for congressional guidance—questions involving broadcaster permission, pay-TV, program origination, and Federal-State-local jurisdiction.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

RAMSEY CLARK, *Deputy Attorney General*.

MINORITY VIEWS I ON H.R. 13286

H.R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a Federal agency to force Congress to give it jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time would serve to under-

write an unauthorized assumption of jurisdiction by the Federal Communications Commission; it would thwart the judicial processes which are presently considering the issues involved; it would create an entirely new concept of regulation at Federal level; it would violate the constitutional guarantees of the first amendment; it would permit a Federal administrative agency (supposedly an arm of the Congress, created by the Congress) to write substantive law by the exercise of rulemaking powers; it would authorize a Federal agency, not answerable to the electorate, to repeal the laws of the several States by rulemaking powers; it would authorize monopolistic practices in the broadcasting of professional sports events and deny millions of people the opportunity of witnessing these events by television; it would create the power of censorship in the Federal Communications Commission insofar as CATV systems are concerned; it would give the Federal Communications Commission the authority in certain areas to determine what a person could or could not receive over his television or radio set—to name a few of the flaws.

Television and radio were not intended to be regulated in the same manner as public utilities. They were subjected to regulation only because of the limited frequencies available in the spectrum. Regulation was for the sole purpose of properly policing the spectrum and seeing that it was not abused. Hence, licenses for broadcasting radio signals were required, because the spectrum was public domain and subject to the police powers of the sovereign.

The history of the Communications Act of 1927 and the amendments thereto of 1934 reflects clearly that the purpose of regulation was to make it possible for the full spectrum to be used in an orderly manner so that broadcast signals would not conflict with each other and thereby create a pandemonium of static which would be of no use to anyone. The operation of the businesses operating under licenses issued by the Government was to be on the free enterprise base. In other words, it was spelled out in the history that the Government would not have jurisdiction of the economics of the several broadcasters. Whether or not they were able to stay in business or to be successful in their operations was to be determined solely by the traditional free enterprise system upon which this country was built. Many attempts have been made by the Federal Communications Commission to gain economic control over the broadcasters. The most recent attempt was in 1963 when the Commission issued orders limiting the length and frequency of broadcast commercials. The House of Representatives struck down this attempt by the passage of a bill denying them the power to enter the field of economic control.

H.R. 13286 as proposed by the Federal Communications Commission is an attempt to gain economic control over CATV systems and thence to move forward to gain economic control over broadcasters and thereby measurably expand the regulatory powers of the Communications Commission on a Federal basis.

A CATV system is a wired communications system and does not use the spectrum or public domain for

broadcasting purposes. Hence, the Commission has heretofore held on several occasions that it did not have jurisdiction of CATV systems as such.

There are three methods by which programs can be received by a CATV system to be transmitted over its wires:

1. The pure off-the-air system. This is the case where a high antenna is employed to catch any broadcast signals that happen to come its way.

2. The microwave-fed system. This is the system where the original broadcast is rebroadcast through the spectrum, one or several times, until it reaches its desired destination. (The FCC has jurisdiction over the microwave facility because it is a rebroadcast into the spectrum, but not over the reception facility.)

3. The coaxial cable. This is a system where a coaxial cable is employed from the broadcasting station to the CATV system. If the coaxial cable does not cross a State line, the Federal Communications Commission does not have jurisdiction. If the coaxial cable does cross a State line, the jurisdiction of the FCC attaches under its jurisdiction over an interstate common carrier by wire. However, in this case the jurisdiction of the Commission does not extend to a determination of what can or cannot be carried over the wire.

The present bill is designed to give the Federal Communications Commission absolute control over reception by all three methods. The main objective of the Federal Communications Commission is to gain

control over the off-the-air (subpar. 1 above) and the coaxial cable (subpar. 3 above), for by this method the Commission can gain direct control over reception of television signals insofar as all CATV systems are concerned. It has had an indirect, limited power over CATV systems using microwave. The operator of a microwave facility must get a license from the Federal Communications Commission because he is transmitting radio signals. The Commission has taken the position that it can issue a license with restrictions and conditions as to what the microwave operator can transmit, even though section 326 of the Communications Act prohibits censorship.

If the Congress passes H.R. 13286 it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals—jurisdiction positively denied the Federal Communications Commission under the Communications Act as amended in 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from satellite transmittals, as well as local broadcasting stations and network broadcasts. Freedom requires that full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its rulemaking powers.

In no community in the United States would the people have the freedom to receive over a CATV

system any local program of weather information, news, PTA meetings, town council meetings, civil defense or other emergency information, or any other matter not approved by the Federal Communications Commission in Washington, D.C. In other words, no program can be originated on a local CATV station, whether it be a high school football game or a meeting of the local school board, unless the Federal Communications Commission has granted authority for such program.

No "grandfather clause"

H.R. 13286 does not contain a "grandfather clause." It makes no difference how much money, how much time, or how much effort any individual, group, or community has invested in developing a CATV system—they must begin from scratch insofar as the Federal Communications Commission is concerned. This bill, if passed, wholly ignores any and all rights the CATV operator might have gained by virtue of the risk he has taken under the free enterprise system. The only thing he does not have to do that would be required of a new operator is to come to the Federal Communications with hat in hand and ask for a construction permit for existing facilities. In other words, he does not have to come in and ask for a construction permit for something that has already been constructed. His entire investment of money, time, and effort is at the whim and discretion of a Federal bureau insofar as its future operation is concerned, regardless of what has been his practice in the past or what rights might have accrued to him.

It is to be noted that the Federal Communications Commission, although previously denying jurisdiction in the field of CATV, in the early months of 1966 completely reversed their position and assumed jurisdiction over all CATV operations. Lawsuits were filed and are now pending. The Federal Communications Commission, no doubt fearing that it had flagrantly overstepped its jurisdiction, came to the Congress to put its stamp of approval on such action. It is asking the Congress at the present time to give it unbridled authority to control every aspect of the CATV business, a power it has never had over the broadcasting business, but which it wants badly—an entirely new concept in governmental regulation.

The Congress of the United States should not abdicate its legislative powers and delegate to a commission the power to write substantive law by rules and regulations promulgated by an appointed body.

If the Federal Government is to enter a new field of regulation, the manner and extent to which this will be undertaken should be definitely and explicitly spelled out by the duly elected representatives of the people of this country in the Congress of the United States and not by a board, a bureau, or a commission wholly and completely insulated from the electorate.

WALTER ROGERS.

J. ARTHUR YOUNGER.

J. OLIVA HUOT.

SAMUEL L. DEVINE.

FRED B. ROONEY.

TIM LEE CARTER.

MINORITY VIEWS II ON H.R. 13286

CATV which brings to the television viewer additional, clear pictures and programs has been very favorably received by the public. Where such systems are already in place, the customers are enthusiastic. Where they are in the process of being constructed, the prospective customers are anxious to obtain the service.

CATV systems are looked upon with mixed emotions. The broadcaster looks favorably upon a CATV system when it projects his signal into areas where it would otherwise be weak or nonexistent. The same broadcaster abhors CATV when it brings into his market expanded service in the form of additional, outside signals which the public in that area could in no other manner receive.

The Communications Act of 1934 was enacted, among others, to prevent overlapping and confusion in the use and allocation of the restricted number of electromagnetic frequencies for broadcasting. The Federal Communications Commission was created to make such allocations. This Commission throughout its history has clearly understood that it was not its place to insure the economic success of a broadcasting enterprise. Nor was it in anywise concerned with reception of signals from broadcast facilities.

Community antenna television systems have been around since 1950, and until 1965 the Federal Communications Commission very clearly indicated that it did not pretend to have jurisdiction over the transmission of broadcast signals by cable. In fact, it spe-

cifically denied having such jurisdiction. Suddenly, however, the Commission did a complete turnabout and argued that it had always possessed authority to regulate cable television as an extension of broadcasting and its recognized interstate character. By a 5-to-2 decision the Commission determined that the Communications Act of 1934 meant something else and something more than it clearly is. When we consider the fact that the makeup of this Federal agency changes rapidly, such action can lead to dangerous consequences.

Apparently uncertain of its ground the Commission prepared and suggested a most peculiar piece of legislation which is H.R. 13286. Even a casual reading of this bill will indicate that it makes no attempt to determine a broad policy under which the CATV industry should develop in conjunction with the broadcasting industry. Instead it merely grants broad authority, throwing the whole problem to the Federal Communications Commission and hoping for the best.

Most of the 30 amendments which were offered by members of the committee during the deliberations on this bill were intended to show the will of Congress and to provide reasonably clear guidelines. They were offered in an attempt to make this bill at least reasonably consistent with past principles for the regulation of industry. They were defeated.

The result of passing H.R. 13286 would be to create havoc within an industry of great importance to the public because the policies adopted by the Commission for its regulation today could well be

reversed or radically changed a month or a year hence. There are no general principles to which the industry can point or by which the Congress may oversee the activities of its creature, the Federal Communications Commission.

In the case of broadcasting facilities the Federal Communications Commission must allocate a frequency and issue a license therefor. In the case of community antenna systems there is no provision for licensing, but the bill does grant authority to issue permits for construction. This, of course, means that construction authority can be denied to any applicant. Under the terms of this bill construction permits would be within the complete discretion of the Commission. In our opinion this grants to the Federal Communications Commission a completely unacceptable and probably unconstitutional power over this industry.

In at least one other particular the bill and its language goes far beyond the range of authority given to regulatory bodies and probably creates a fatal flaw. Subsection (d) of section 331 purports to leave room for additional regulation of the CATV industry by the various States, but includes an exception which would nullify any such laws in direct conflict with "the provisions of this Act or the regulations promulgated under it." The result of such a provision is to make it possible for four individual Commissioners, a majority of the Federal Communications Commission, to issue a regulation, the effect of which would be to nullify State laws.

There are presently pending lawsuits which will determine whether or not the Federal Communications Commission was right when it first denied having jurisdiction over CATV or whether it was right later when it reversed itself. Also pending are lawsuits to determine the applicability of the copyright laws to material carried by CATV systems. The determination of these matters requires no legislation, and little purpose is served in passing such legislation at this time particularly since it does not purport to lay down realistic policies and guidelines within which regulation of the CATV industry can logically proceed.

We are, for these reasons, opposed to the passage of H.R. 13286.

JAMES T. BROYHILL.

JAMES A. MACKAY.

SEPARATE VIEWS OF CONGRESSMAN
J. J. PICKLE,
JUNE 15, 1966

Most everyone will agree that the CATV system's arrival in the communications field was an unforeseen and unprovided for event in the laws regulating broadcasting in behalf of the general public. It is generally agreed that this arrival has developed into an extension of broadcasting which vitally affects the public interest.

I do agree with the general approach of this bill which is a grant of authority to the FCC over

the community antenna systems, which should be recognized as an extension of broadcasting. If the Congress is to meet its responsibility to the general public in this area, it should enact a more specific and well-defined piece of legislation spelling out the rules and regulations. I would like to make three specific recommendations:

1. It should be clearly stated that the community antenna systems should be able to go into areas not normally covered by broadcasters, and these areas should be defined as areas which are not within the general sphere of influence of the local station. This could be satisfactorily taken care of by defining a local station as one whose sphere of influence and protection extends a definite number of miles. For instance up to 45 miles—or to the grade A contour, as the FCC likes to describe. Extending this sphere all the way to the grade B contour (often as much as 70 miles) creates an unrealistic requirement for the community antenna systems.

2. This bill should also spell out clearly that the protection given by the FCC to stations in the top 100 markets, as determined by the ARB, be given to all stations regardless of size. As the FCC rules now stand, the large stations—or big cities—which don't need protection are getting it and the small stations—and small cities—which need it most are getting none at all. If the rules are good rules they ought to apply to all stations—across the board. To do otherwise, is discrimination, in reverse, and not fair at all.

3. We should be very careful not to allow any origination of program matter on community antenna systems unless it is clearly spelled out.

I submit that this Congress would enact a fairer and more reasonable piece of legislation if it would consider carefully these three possible amendments.

J. J. PICKLE.

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 21,869, 21,870
and 21,870-A

VALLEY VISION, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

ON PETITIONS TO REVIEW DECISIONS AND ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

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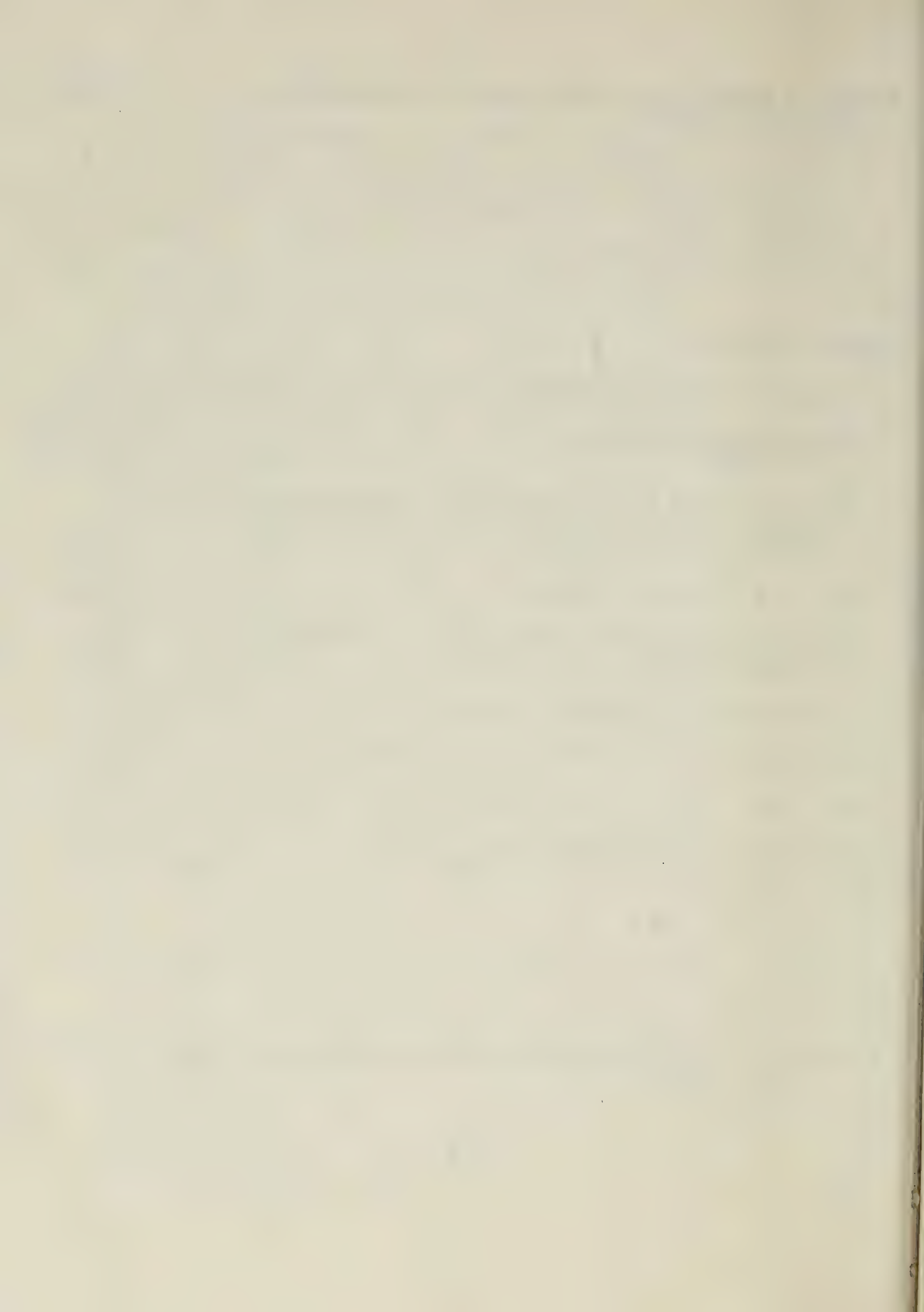
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H.R. Rept. No. 1559, 87 Cong., 2d Sess.	35
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* Cases and other authorities chiefly relied upon are marked
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 21,869, 21,870
and 21,870-A

VALLEY VISION, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

ON PETITIONS TO REVIEW DECISIONS AND ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

JURISDICTIONAL STATEMENT

The petitionsto review in Case Nos. 21869 and 21870 were filed pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. 402(a), by Valley Vision, Inc., from (1) an order of the Commission, released March 30, 1967, in which the Commission denied reconsideration of its earlier order to show cause, and (2) a decision of the Commission, released May 16, 1967, in which the Commission found that petitioner's CATV system in Placerville, California, had commenced service without giving the notice required by Section 74.1105 of the Commission's Rules, 47 CFR 74.1105, and was importing distant signals from San Francisco,

Modesto, and Chico, California, in violation of Section 74.1107 of the Rules, 47 CFR 74.1107, and ordered petitioner to cease and desist from such violations. The appeal in Case No. 21870-A was filed pursuant to Section 402(b) of the Communications Act, 47 U.S.C. 402(b) by Valley Vision in the Court of Appeals for the District of Columbia from the above-mentioned Commission cease and desist decision. Such appeal was transferred to this Court on September 6, 1967.

COUNTERSTATEMENT OF THE CASE

We believe that a counterstatement of the facts is necessary to provide the Court with a more complete and accurate statement of this case than has been supplied by petitioner. Additionally, respondents believe that the following general discussion of the

development and growth of community antenna television systems (CATVs) and the Commission's regulatory policies with respect thereto will be helpful to the Court in connection with its consideration of this proceeding.

1. Background

Originally, community antenna television systems (commonly called CATV systems)^{1/} came into being to bring television to areas not reached by any television station and to afford multiple services to areas not already having them. Distance from originating stations, intervening obstacles such as mountains or other high elevations, or seasonal and other changes in atmospheric conditions sometimes impair or make impossible good television reception. Where such conditions prevail, master antennas have been erected at suitable locations, usually on a mountain or other high elevation where the reception of the signals of the desired stations is strong. The signal is then brought to the community by cable or radio hops, and distributed by cable to the homes of individual

^{1/} The Commission's rules define a community antenna television system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such terms shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." Sections 74.1101(a), 31 F.R. at 4570, 2 F.C.C. 2d at 801.

2/ customers within the community. At the home, the incoming cable is attached directly to the receiving connection of a regular television set.

While the early CATV systems customarily offered programs on three channels, the newer systems generally have a twelve channel capacity, and a twenty channel capacity is being projected for systems in the near future. (See Second Report and Order of the Commission, pars. 116, 117, 31 F.R. at 4557-8, 2 F.C.C. 2d at 771-2.) 3/ The latest estimates place the number of systems in operation at over 1,800, with some 1,600 additional systems franchised but not yet in operation, and over 2,400 applications pending in 1,200 cities. The distances which signals are taken has also greatly increased, to as much as 600 miles.

Along with this general growth of CATVs, there has been a gradual change in the focus of attention of community antenna operators. While franchises were initially obtained only in underserved communities of small or modest size, CATV franchises are now being sought or obtained in the largest cities. (Second Report and

2/ The distribution cable facilities may be supported on electric power or telephone utility poles, and easements and rights-of-way to use streets and alleys are often obtained from the municipal government, as are franchises to engage in the business.

3/ The Second Report and Order in Docket Nos. 14895, 15233 and 15971 et al., is the Commission opinion released March 8, 1966, adopting the rules governing CATV operation.

Order, par. 117, 31 F.R. at 4558, 2 F.C.C. 2d at 771-2). Because of this growth, the Commission has been concerned whether CATV service, which is available only to those persons who are willing and able to pay and who are within reach of the cable facilities, might not adversely affect the maintenance and development of the basic "free" system of television broadcasting, particularly the development of UHF stations, through the loss of audience and advertising which a CATV can cause.

The Commission noted that Congress, in the 1962 all-channel receiver legislation, had made the judgment that the widest possible development of UHF is the best way of achieving an adequate national television service, including both commercial and educational systems (31 F.R. at 4557, 2 F.C.C. 2d at 770). It believed that since UHF development was already proceeding in at least 163 communities or area -- most of which were located within the top 100 television markets -- any halt or curtailment of the growth of UHF development caused by the distribution of signals from other areas in these communities by CATV would be particularly significant.

The Commission determined that there should be full exploration, in an evidentiary hearing, of the impact of any new

proposed CATV system bringing signals from beyond the Grade B contour of the original station into the Grade A service area of any station in a community in one of the largest one hundred television markets.^{4/} In order to avoid disruption of existing service, the Commission permitted systems in operation on February 15, 1966, the date on which it had given public notice that new rules would be adopted, to continue their existing operations.

Section 74.1107 of the Rules was adopted to effectuate these determinations. The portions of that rule pertinent to this proceeding are summarized as follows: Subsection (a) contains the general standard that no CATV shall extend the signal of any television station beyond its Grade B service area into the Grade A service area of another station located in one of the top 100 television markets until such extension is shown in an evidentiary hearing before the Commission to be consistent with the public interest. Subsection (d) exempts from this hearing requirement those CATV systems which had commenced service on or before February 15, 1966.

^{4/} A Grade B contour is the imaginary line along which a good picture may be expected for 90 per cent of the time at the best 50 per cent of the locations. The Grade A contour defines the area at the perimeter of which a good picture is received for 90 per cent of the time at the best 70 per cent of the locations. See Clarksburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D.C. 211, at 215-216 n. 12, 225 F.2d 511, at 515-516 n. 12 (1955).

Section 74.1105 requires that notification of intention to commence service (or to add a new distant signal) be served on the Commission, all licensees and permittees within whose Grade B contour the system will operate, and certain other persons. Service cannot be commenced until thirty days after this notice is served. The purpose of this rule is to give interested persons an opportunity to lodge with the Commission objections or requests for special relief, or for licensees to request carriage and/or nonduplication (see Sections 74.1103 and 74.1109).

2. The Present Proceeding

Petitioner is the owner of a community antenna television system located at Placerville, California. Placerville, a community of approximately 5,000 persons, is located about 40 miles from Sacramento and about 60 miles from Stockton, California. Sacramento-Stockton is ranked as the 27th television market. Placerville is within the predicted Grade A contours of three Sacramento stations. On September 30, 1966, a date subsequent to the adoption of the Commission's CATV rules, petitioner commenced operation of its system. The system serves approximately 450 subscribers and carries the following television signals: KCRA-TV, KXTV, KOVR, and KVIE, Sacramento, California; KGO-TV, KTUV, KPIX, KRON-TV, and KQED, San Francisco, California; KLOC-TV, Modesto, California; and KHSL, Chico, California (R. 68-69).

On November 1, 1966, following the receipt of information which indicated that petitioner was operating its system in violation of the Commission's rules, the Commission addressed a letter of inquiry to petitioner (R. 15-16). Petitioner responded by letter dated November 8, 1966 (R. 17-19). It admitted commencing operation without giving the notice required by Section 74.1105 of the Commission's rules, and also admitted carrying the signals of distant television signals on its system. Petitioner asserted, however, that the Commission did not have jurisdiction to regulate its CATV system.

Nonetheless, on January 11, 1967, petitioner filed a request, pursuant to Section 74.1109 of the Commission's Rules, for a waiver of Sections 74.1105 and 74.1107(a) (R. 238-287). Petitioner recited that its previous position regarding the Commission's lack of authority over CATV was based upon the advice of Robert B. Cooper, President of Valley Vision, Inc. It further stated that Mr. Cooper had subsequently been replaced and that the waiver request was filed upon the advice of counsel.

As grounds for a waiver of the rules, petitioner claimed that off-the-air service in Placerville was unsatisfactory; that its CATV system would not have an adverse effect on the existing Sacramento market or on the development of UHF television in either the Sacramento or Stockton television markets; and that any curtailment of petitioner's system would impair its economic viability. Kelly Broadcasting Company, licensee of television

station KCRA-TV, Sacramento, and Great Western Broadcasting Corporation, licensee of television station KXTV, Sacramento, opposed petitioner's waiver request.

On February 17, 1967, the Commission issued an Order to Show Cause, directing petitioner to show cause why it should not be ordered to cease and desist from violating the Commission's rules (R. 20-24).^{5/} In view of the particular circumstances of the case, however, [described in paragraph 4 of the Commission's Order to Show Cause] the Commission departed from its announced policy of refusing to act on waiver petitions until a CATV system brings itself into compliance with the rules^{6/} and, rather than requiring a thirty day cessation of operation before granting relief, permitted petitioner to carry the local Sacramento-Stockton signals pending further order by the Commission.

Petitioner filed a petition for reconsideration of the show cause order on March 20, 1967 (R. 48-55). This was denied by Commission Order of March 30, 1967 (R. 66). A hearing was held on April 6, 7, and 10, 1967. On this latter date the record was closed and certified to the Commission for decision. The parties then filed proposed findings of fact and conclusions of law.^{7/}

^{5/} Section 312 of the Communications Act provides for the issuance of cease and desist orders, 47 U.S.C. 312.

^{6/} See Buckeye Cablevision, Inc., 3 F.C.C. 2d 808, 811 (1966)

^{7/} Petitioner filed a pleading entitled "Skeleton Proposed Findings of Fact and Conclusions of Law" (R. 217-226). Its request for an extension of time in which to file its pleading was denied by the Hearing Examiner on April 10, 1967. An appeal was taken to the Commission which affirmed the Examiner's ruling on April 19, 1967 (R. 180).

Upon consideration of the hearing record and the pleadings filed by the parties, the Commission released a Decision on May 16, 1967, ordering petitioner to cease and desist from violating Sections 74.1105 and 74.1107(a) of the Commission's rules, 47 CFR 74.1105, 74.1107(a) (R. 181-189). The Commission found that petitioner did not, prior to commencing service on September 30, 1966, give the notice prescribed by Section 74.1105 to the licensees and permittees of the television stations within whose predicted Grade B contours it was operating. It found that petitioner's CATV system operates within the predicted Grade A contour of television stations located in the Sacramento-Stockton television market, that this market is the 27th largest in the United States, that by bringing the signals of television stations from San Francisco, Modesto, and Chico, California, into Placerville, petitioner was extending these signals beyond their Grade B contours, and that petitioner had neither requested nor obtained Commission approval to extend these signals, in violation of Section 74.1107(a) of the Commission's rules.

In addition, the Commission rejected petitioner's argument that its system did not come within the predicted Grade A contour of Sacramento television stations KXTV and KQVR. The Commission held that petitioner's engineering showing was inadmissible and irrelevant since only the standard predicted method of contour prediction was contemplated by the language of Section 74.1107(a). Accordingly, petitioner was ordered to cease and desist from

operating its CATV system except for the carriage of the four Sacramento television stations. As to these stations, the order was conditioned upon petitioner's compliance with Section 74.1103 of the Commission's rules, 47 CFR 74.1103, for a period of thirty days so that the notice provisions of Section 74.1105 could be enforced.^{8/}

On May 29, 1967, petitioner filed in this Court petitions to review the Commission's Order denying reconsideration of the show cause order (Case No. 21869), and the final Commission cease and desist order (Case No. 21870). Also on this date, petitioner filed a request for an interlocutory stay of the Commission's decision. Respondents filed a motion to dismiss the petitions to review on June 12, 1967. On June 29, 1967, this Court granted petitioner's stay request and continued respondents' motion to dismiss until the cases are heard on the merits. Respondents' request for reconsideration of these actions was denied on August 1, 1967. Case Nos. 21869 and 21870 were consolidated by order of this Court on August 9, 1967.

On June 15, 1967, petitioner filed a Notice of Appeal from the Commission's cease and desist order in the Court of Appeals for the District of Columbia Circuit. Petitioner then moved to dismiss that appeal on July 19, 1967, on the basis of this Court's order of June 29, 1967. The District of Columbia Circuit did not dismiss the appeal, choosing instead to transfer the case sua sponte because an appeal had first been filed in the Ninth Circuit. (The transferred appeal is Case No. 21870-A in this Court)

^{8/} The force and effect of this decision was stayed first by petitioner's appeal and then by this Court's order of June 29, 1967; therefore petitioner has never complied with the notice requirement of Section 74.1105.

QUESTIONS PRESENTED

In the view of respondents the following questions are presented:

1. Whether this Court has jurisdiction to review the above-captioned cases.

2. Whether the Communications Act gives the Commission the authority it has asserted over community antenna television systems.

3. Whether the Commission has the authority under Section 312 of the Communications Act to issue cease and desist orders against CATV systems.

4. Whether the Commission's cease and desist proceeding was conducted in a fair manner.

SUMMARY OF ARGUMENT

I.

This Court is without jurisdiction to review the Commission's actions in this proceeding. As to Case No. 21,870, Section 402(b)(7) of the Communications Act gives the United States Court of Appeals for the District of Columbia exclusive jurisdiction to review cease and desist orders issued by the Commission. The language of the statute and the legislative history of the 1952 amendments to the Communications Act make it clear that a specific and exclusive path of judicial review of cease and desist orders was being provided so as to avoid confusion. The question of whether it is proper to issue a cease and desist order against a CATV system is one for the court with exclusive jurisdiction, the District of Columbia Court of Appeals. This view is supported by the District of Columbia Circuit's order transferring the appeal taken there to this Court.

As to Case No. 21,869, the Commission's show cause order and the denial of reconsideration thereof were interlocutory and procedural in nature and, therefore, not subject to judicial review under 28 U.S.C. §2342. These orders did not compel or forbid any conduct. If they are reviewable at all, they are part of the cease and desist proceeding which is only reviewable in the United States Court of Appeals for the District of Columbia Circuit. Under these circumstances, respondents respectfully suggest the transfer of this proceeding to the District of Columbia Circuit.

II.

The Commission has determined that the indiscriminate and uncontrolled growth of CATV places in jeopardy individual broadcast stations and the basic television allocations structure established by the Communications Act, and thus "the public interest in the larger and more effective use of radio" (Section 303(g)). The essential validity of this conclusion, the reason underlying the Commission's assertion of jurisdiction over CATV, has recently been upheld in Buckeye Cablevision, Inc. v. Federal Communications Commission, __ F.2d __ (C.A.D.C. 1967). But for nearly a decade, the Commission has recognized that CATV systems operating in the service area of broadcast stations can have an adverse economic impact on those stations. CATV and TV Repeater Services, 26 F.C.C. 403, 421-22 (1959). And see Carter Mountain Transmission Corp., 32 F.C.C. 459, affirmed, Carter Mountain Transmission Corp. v Federal Communications Commission, 321 F.2d 359 (C.A.D.C.), cert. den. 375 U.S. 951 (1963), where the Court of Appeals held that conditions imposed upon the grant of an application to construct a microwave service, designed to minimize the adverse impact of a CATV system on a local broadcast station, were entirely reasonable limitations under the public interest standard of the Communications Act. The Commission's rules were designed to strike a balance between the interests of the CATV systems and of the broadcasters so as to serve the overriding public interest in the advancement of a nationwide broadcasting system.

CATVs are engaged in interstate communication by wire or radio within the meaning of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 153. This being so, and in recognition of the Commission's "comprehensive powers to promote and realize the vast potentialities of radio," National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943), the Commission clearly has the authority (47 U.S.C. 154(i) and 303(r)), to prescribe by rule the conditions under which a television signal may be extended through the medium of a CATV system in order to prevent the frustration of the Congressional scheme of television regulation, in particular, the mandate of 47 U.S.C., sections 307(b) and 303(s). The Communications Act grants to the Commission authority to regulate all forms of interstate communication by wire and radio. Thus, petitioners' contention that the statute requires that the Commission only concern itself with the regulation of common carriers and the licensing of radio stations is, we submit, too narrow a construction of the Congressional mandate. The Communications Act has been judicially construed as granting the Commission expansive powers in its regulation of a dynamic, rapidly changing industry. National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134 (1940); Philadelphia Broadcasting Co. v. Federal Communications Commission, 359 F.2d 282 (C.A.D.C. 1966). Where an operation such as CATV, which we submit is unquestionably comprehended by the Communications Act as an interstate communication,

has raised the specter of frustration of enforcement of the Act, it can be dealt with under the Commission's broad rulemaking powers. American Trucking Association v. United States, 344 U.S. 298 (1953). Any prior positions taken by the Commission in this regard do not estop its assertion of jurisdiction over CATV. We point out that the Commission has not previously stated in unequivocal terms that it did not have such jurisdiction. See Second Report and Order, 2 F.C.C. 2d at 732-734. Even if past rulings had been as represented by the petitioners, which we do not concede, the Commission is not estopped from correcting a ruling of law which appears to be clearly erroneous. Carter Mountain Transmission Corp. v. Federal Communications Commission, 321 F.2d 359 (C.A.D.C. 1963); United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392 (1965).

III.

The Commission clearly has authority to issue cease and desist orders against CATV systems which have violated valid regulations. The plain language of Section 312(b) of the Communications Act states that a cease and desist order can be issued against "any person." Nothing in the legislative history of Section 312 points to a different conclusion. Clear court precedent supports this view of the statute. Booth American Company v. Federal Communications Commission, 374 F.2d 311 (C.A.D.C., 1967); Buckeye Cablevision, Inc. v. Federal Communications Commission, C.A.D.C., Case No. 20,274, decided June 30, 1967. Furthermore, CATV is an integral part of the broadcast distribution system, and the

regulations which the Commission adopted relative to CATV are within the framework of the national broadcast allocation scheme. Violation of these regulations is manifestly subject to the cease and desist power of the Commission.

IV.

The Commission's conduct of the cease and desist proceeding here was clearly fair. The Commission properly refused to consider petitioner's proffered engineering measurements which purportedly show the lack of any rule violation because Section 74.1107 of the Rules calls for a predicted method of plotting station contours. This was done for the sake of definiteness and ease of administration. When petitioner comes into compliance with Section 74.1107, it can make its engineering showing at the hearing that rule provides, but not before. Booth American Company v. Federal Communications Commission, supra; Buckeye Cablevision, Inc. v. Federal Communications Commission, supra. Petitioner's allegation that it did not receive the 30 day notice of hearing required by Section 312(c) of the Act is erroneous because petitioner has computed the days from the wrong date. The allegation that the 7 days allowed for filing proposed findings of fact and conclusions of law was too short is not well founded. The Commission clearly set out the reasons for expeditious action in the show cause order. Finally, petitioner's argument concerning the propriety of the Commission's Broadcast Bureau being a participant

in the hearing below is without merit. Since the burden of proof is on the Commission in a cease and desist proceeding, some arm of the Commission must participate, and the Broadcast Bureau's Hearing Division does so for administrative convenience at the request of the Commission's CATV Task Force.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION TO REVIEW CASE NOS. 21869 and 21870 BECAUSE EXCLUSIVE JURISDICTION IS VESTED IN THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

This Court is without jurisdiction to review the Commission's action in Case Nos. 21,869 and 21,870. In regard to the latter case, Section 402(b)(7) of the Communications Act gives the United States Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to review cease and desist orders issued by the Commission. Insofar as petitioner seeks review in Case No. 21,869 of the show cause order which led to the cease and desist order, this is interlocutory in nature and only reviewable upon review of the final agency action.

On June 12, 1967, we filed a motion to dismiss Valley Vision's petitions to review based on the foregoing allegations. This Court's order of June 29, 1967, continued consideration of our motion until the cases are heard on the merits. Subsequently, the Court of Appeals for the District of Columbia supported our view but transferred the appeal taken in that Circuit to this Court "in deference to §2112(a) [28 U.S.C. §2112(a)] and the need for avoiding unseemly conflict." We respectfully renew our arguments on this point.

A. The Petition For Review In Case No. 21,870 Should Be Dismissed Because This Court Has No Jurisdiction To Review Commission Cease And Desist Orders.

Section 402(a) of the Act, 47 U.S.C. 402(a), provides that proceedings to "enjoin, set aside, annul, or suspend any order of

the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in [28 U.S.C. sections 2341-2351]." Section 402(b) of the Act specifies that:

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

. . .

(7) By any person upon whom an order to cease and desist has been served under Section 312 of this Act.

This language is specific, and therefore petitioner can seek judicial review only by way of an appeal filed under section 402(b)(7) in the District of Columbia Circuit. ^{9/}

There is no doubt that these two sections specify mutual exclusive methods for reviewing Commission actions. Rhode Island Television Corporation v. Federal Communications Commission, 116 U.S. App. D.C. 40, 320 F.2d 762 (1963); Functional Music, Inc. v. Federal Communications Commission, 107 U.S. App. D.C. 34, 274 F.2d 543 (1958), cert. denied 361 U.S. 813 (1959). The legislative history of section 402(b)(7) bears this out. When Congress amended the Communications Act in 1952 to authorize the Commission to use cease and desist orders, section 402(b) was amended to provide that ^{9/} Petitioner did file such an appeal. It was transferred to this Court pursuant to 28 U.S.C. 2112(a) (see discussion, infra).

these orders would be reviewable only in the Court of Appeals for the District of Columbia. P.L. 554, approved July 1952, 66 Stat. 711. The Senate Report accompanying the 1952 amendments points out:

Subsection (b) attempts a more precise and comprehensive definition of the jurisdiction of the United States Court of Appeals for the District of Columbia in cases appealed from the Commission. S. Rept. No. 44, 82nd Cong., 1st Sess., p. 11.

And the House Report similarly notes:

As is the case under section 402 of the present law, subsection (b) specifies certain types of orders and decisions in the case of which judicial review may be had only in the United States Court of Appeals for the District of Columbia and subsection (a) deals with review of other orders and decisions of the Commission H. Rept. No. 1750, 82nd Cong., 1st Sess., p. 16.

The revision of section 402(b) made more precise and comprehensive the jurisdiction of the United States Court of Appeals for the District of Columbia, and was undertaken because under the old law "confusion and controversy have arisen concerning what decisions and orders of the Commission might become the subject of judicial review and in what court." S. Rept., supra, p. 11. Thus, the same Congress which enacted the authority of the Commission to issue cease and desist orders in section 312(b) of the Act, 47 U.S.C. section 312(b), also provided a specific and exclusive path of judicial review of such orders, in order to avoid confusion.

The claim that section 402(b)(7) does not apply because the cease and desist order was improperly issued against a non-

licensee begs the question.^{10/} The fact is that the Commission, purporting to act under section 312(b), conducted a show cause proceeding pursuant to that section and issued a cease and desist order. While the legality of that action is one of the central issues on appeal, it can be reached only by a Court which has jurisdiction to review the proceeding below since such jurisdiction is a threshold consideration. We believe that the plain language of the statute, the underlying Congressional intent and the cases contravening section 402 all make clear that jurisdiction lies not with this Court but with the Court of Appeals for the District of Columbia Circuit.

Finally, in support of our view, we invite the Court's attention to the order of the Court of Appeals for that Circuit (a copy of which is attached hereto) transferring the appeal taken in that Circuit to this Court (Case No. 21,870-A). In so doing, the District of Columbia Court stated:

We do not dismiss but yield sua sponte to the Congressional intent that an administrative action be reviewed only by the Court of Appeals in which proceedings were first instituted. 28 U.S.C. §2112(a). We do so despite our belief that the District of Columbia Circuit has exclusive jurisdiction to review the challenged order. The Federal Communications Commission has the power to issue cease and desist orders pursuant to §312 of the Communications Act to enjoin violations of the CATV regulatory scheme. See Buckeye Cablevision, Inc. v. Federal Communications Commission, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 20,274, decided June 30, 1967); contra, Southwestern Cable Co. v. United States, ___ F.2d ___ (No. 21,183, 9th Cir., decided April 28, 1967). Under §402(b)(7) the Court

^{10/} Both Sections 312(b) and 402(b)(7) are in terms not of "licensees" but of "persons."

of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review Federal Communications Commission cease and desist orders.

To avoid any possibility of misunderstanding, our action today transferring the appeal to the Court of Appeals for the Ninth Circuit is in deference to §2112(a) and the need for avoiding unseemly conflict, and does not signal that we are receding from our view that the case properly belongs in the District of Columbia Circuit. [Footnotes omitted]

B. The Petition For Review In Case No. 21,869 Should Be Dismissed Because The Order Appealed From Is Interlocutory In Nature And Is Encompassed Within Case No. 21,870.

The Petition for Review in Case No. 21,869 seeks review of the Commission order which denied petitioner's Petition for Reconsideration of the Commission's order directing Valley Vision to show cause why its CATV system at Placerville, California should not be ordered to cease and desist from carrying certain television signals.

The Commission's show cause order and the order denying reconsideration (R. 20-24, 66) were interlocutory and procedural in nature, and hence not subject to judicial review under 28 U.S.C. section 2342 which grants the Courts of Appeal jurisdiction to review only "final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." (Emphasis added). See Bethesda-Chevy Chase Broadcasting Co. v. Federal Communications Commission, ___ F.2d ___ C.A.D.C., decided September 28, 1967; Southland Industries v. Federal Communications Commission, 99 F.2d 117 (1938). A show cause order is analogous to a hearing order, and does not directly impose either obligations or penalties.

Cf. Federal Power Commission v. Edison Co., 304 U.S. 375 (1938). Since the show cause order itself and the order denying reconsideration thereof did not compel or forbid any conduct, they lack the requisite impact necessary for judicial review. Bethesda-Chevy Chase Broadcasting Co. v. Federal Communications Commission, *supra*; Amerada Petroleum Corporation v. Federal Power Commission, 285 F.2d 737 (10th Cir., 1960); Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir., 1954), cert. denied sub nom. Japan-Atlantic & Gulf Conference v. United States, 347 U.S. 990. See generally Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

These orders are reviewable only upon the review of the final agency action to which they are related,^{11/} and are thus "ancillary" to the cease and desist order, the final agency action in this case. Accordingly, review is proper only in the United States Court of Appeals for the District of Columbia Circuit. Helena TV, Inc. v. Federal Communications Commission, 269 F.2d 30 (9th Cir., 1959); Tomah-Mauston Broadcasting Co. v. Federal Communications Commission, 113 U.S. App. D.C. 204, 306 F.2d 811 (1962).

In light of the above circumstances, we respectfully suggest that this Court transfer the above-captioned appeals to the United States Court of Appeals for the District of Columbia.

^{11/} The Administrative Procedure Act, 5 U.S.C. 704, provides in part that "[a]ny preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action."

II. THE COMMUNICATIONS ACT GIVES THE COMMISSION
THE AUTHORITY IT HAS ASSERTED OVER COMMUNITY
ANTENNA TELEVISION SYSTEMS.

Petitioner's chief contention is that the Commission has no jurisdiction over CATV systems. Its argument is divided into three parts: that the Commission's assertion of jurisdiction over CATV is inconsistent with prior statements by the Commission that it had no such jurisdiction; that the sections of the Communications Act relied on by the Commission do not confer jurisdiction over CATV because of the separate common carrier and radio functions of the Commission; and that the Commission has no authority to make rules regulating CATV because it can only regulate licensees under Title III of the Communications Act.

This Court held in Southwestern Cable Co. v. United States, 378 F.2d 118 (1967), that the Commission's authority "was exercisable only against licensees or applicants." Since CATVs fall in neither category, the Court set aside a Commission order limiting the expansion of CATV systems in San Diego pending a hearing before the agency. In reaching its decision, the Court relied largely on language in Regents v. Carroll, 338 U.S. 586 (1950), wherein the Supreme Court observed that the Commission's "powers center around the grant of licenses."

More recently, the Court of Appeals for the District of Columbia Circuit upheld the Commission's jurisdiction over CATV. Buckeye Cablevision, Inc. v. Federal Communications Commission,

___ F.2d ___, decided June 30, 1967. The Court concluded that CATV, "as a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory scheme" is subject to Commission authority.

We have requested the Supreme Court to review the Southwestern decision, contending that it erroneously decides a new and important question of law and that it is in conflict with the decision of another circuit. In this brief we attempt to show that the Commission's assertion of jurisdiction is not wrong in light of past statements, that the Regents case is not dispositive of the jurisdictional question, and that the Communications Act, as the Court in Buckeye found, confers on the Commission the power to regulate CATVs.

A. Prior Positions Taken By The Commission Do Not Estop Its Present Assertion Of Jurisdiction Over CATV.

Petitioner urges (pet. Br. 15-21) that the Commission has previously denied that it has jurisdiction over CATV and that it has unsuccessfully sought to obtain such jurisdiction from Congress. The Commission fully discussed this contention in the Second Report and Order, 2 F.C.C. 2d at 732-734. That discussion makes clear that the Commission had not previously stated in unequivocal terms that it did not have jurisdiction over CATV. What the Commission did earlier was to disclaim plenary power, under section 303(a), (b), (f), (g), (i), and (r) to "regulate any and all enterprises which happen to be connected with one of the many

aspects of communications"--a power which is not claimed here. However, it assumed (without deciding) that CATVs are within the scope of section 3(a) and also found it unnecessary to pass on the question of its authority to regulate them directly because of adverse effect on broadcasting.^{12/}

More, important, even if past rulings had been as represented by petitioner, the Commission is not estopped from correcting a ruling of law which appears to be clearly erroneous. Carter Mountain Transmission Corp. v. Federal Communications Commission, 321 F.2d 359, 369 (C.A.D.C.), cert. den. 375 U.S. 951; Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672; United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 404-406.^{13/} Indeed, in United Gas Improvement, the authority of the Power Commission over gas leases for resale in interstate commerce was upheld, notwithstanding the fact that the agency had initially concluded in the same proceeding that it lacked jurisdiction and then reversed itself on remand (on another ground) from a court of appeals decision which assumed a lack of authority, Public Service Commission of New York v. Federal Power Commission, 287 F.2d 143 (C.A.D.C. 1960).

Finally, the Commission's recent request to Congress to amend the Act did not constitute an admission that jurisdiction

^{12/} See CATV and TV Repeater Services, *supra*, at 428-431.

^{13/} See also American Trucking Associations, Inc., et al. v. Atchison T. & S. F. Ry Co., 387 U.S. 397 (1967); FTC v. Dean Foods Co., 384 U.S. 597, 608-611 (1966); Calbeck v. Travellers Ins. Co., 370 U.S. 114, 127n. 15 (1962); Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 183 (1957).

over CATV did not exist. As the Commission stated in the Second Report and Order (2 F.C.C. 2d at 787):

There are four areas which we shall urge to the Congress as particularly warranting its attention:

(i) As we stated in the notice, we are clearly concerned here with new and important questions of policy and law in the communications field. We therefore state again that we would welcome congressional guidance as to policy and congressional clarification of our authority in all respects in the field. (See notice, par. 31, 1 FCC 2d at p. 465.) 14/

In considering the Commission's request, the House Committee on Interstate and Foreign Commerce reported out H.R. 13286, a bill to amend the Communications Act to give the Commission

14/ See also Hearings before the Subcommittee of the Committee on Appropriations, United States Senate, 89th Cong., 2d Sess., on H.R. 14921, p. 1035:

"Senator MAGNUSON. That is the question I wanted to ask. You people honestly feel that you need some congressional reassurance of your authority.

"Mr. HYDE. We think it would be helpful to us.

"Senator MAGNUSON. I do not mean helpful to you. I mean legal authority.

"Mr. HYDE. No, sir.

"Senator MAGNUSON. I am talking legally. Do you need something in addition to what you now have?

"Mr. HYDE. No, sir. We think we are acting within the authority granted to us to regulate interstate communications.

"Senator MAGNUSON. You have the authority?

"Mr. HYDE. We do. But you will remember that the authority under which we are acting was granted before there was any such thing as community antenna system, and naturally Congress might very well wish to give us more direction in this area.

"Senator MAGNUSON. Well, it is my understanding--your proposal is for Congress to, if they saw fit, to give you some direction--

"Mr. HYDE. That is right, sir.

"Senator MAGNUSON. Rather than give you more legal authority

"Mr. HYDE. We think that we are correct in our assertion of legal authority to act."

authority to issue rules and regulations with respect to CATV. H. Rept. No. 1635, on H.R. 13286, 89th Cong., 2d Sess. While the Report specifically refused to agree or disagree with the Commission's conclusions as to its jurisdiction, its significance is that Congress, so far as it has given any indication of its views, has moved to confirm the Commission's power and has, with full knowledge of the exercise of jurisdiction, taken no action to change the Commission's course.

- B. Regents v. Carroll, Which Involved A Contractual Dispute Between A Broadcast Licensee And A Third Party, Does Not Resolve The Question Of The Commission's Jurisdiction Over An Entity Engaged In Interstate Communication By Wire, An Activity Expressly Subject To The Commission's Regulatory Authority.

In its Southwestern opinion, this Court stated that its decision was guided by the language of the Supreme Court in Regents v. Carroll, that "the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license that the Commission may apply to enforce its decisions" 338 U.S. at 597-599. In that case the Commission granted a license on the condition that the station repudiate its contract with certain persons, which contract, it was found by the Commission, endangered the financial ability of the station. After repudiation, a state court entered judgment for breach of contract against the station. The contention was raised that by its order the Commission had invalidated the contract.

The issue in the case was stated thusly by the Court:

"whether in the light of the Supremacy Clause of the Constitution a court state/may enter a judgment that grants respondents a recovery on the very stock purchase contract that justified the Commission's refusal of a license." As it had on earlier occasions,^{15/} the Court noted that the Communications Act does not give the Commission the authority to adjudicate private controversies. It found that the Commission had no power to "act as a bankruptcy court" or to determine the validity of contracts between licensees and others. Id. 602. And accordingly it concluded that the state court's judgment did not contravene the Supremacy Clause.

It is in this context that the discussion of the Commission's powers took place. Unlike CATVs, the other party to the contract in Regents was not a person engaged in interstate communication by wire and radio. As we show in the following section of our brief, the Act applies to all such communications and the Commission was expressly created to regulate such activity. For this reason we respectfully urge that Regents v. Carroll, relied upon by petitioner (Pet. Br. 27-28), is not controlling, and that the better view of that case is the one taken by the District of Columbia Circuit in Buckeye:

In Carroll, the Supreme Court held that the Commission's duty to effectuate the public interest requirements of Subchapter III "centered" around its licensing power which does not encompass abridgment of contracts between

^{15/} See e.g., Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138.

licensees and third parties. But the Court's view of this limitation was based largely on the agency's lack of authority at the time to issue cease-and-desist orders, against licensees or anyone else, to prevent violations of the Act. Subsequently Congress conferred such authority, [47 U.S.C. 312(b)(c)] which correspondingly expanded the Commission's power to protect the regulatory scheme. We do not have to decide the degree to which Carroll may still be viable since we think that in any event, it does not bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire scheme. [Footnote omitted.]

The CATV industry is indisputably part of the nation's communications system. This is a field in which Congress "gave the Commission not niggardly but expansive powers," and defined "broad areas for regulation." It did so because it did not wish to "frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency," National Broadcasting Co. v. United States, 319 U.S. 190, 219, 220 (1943).

Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry. See also Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940), and Philadelphia Broadcasting Co. v. Federal

Communications Commission, 359 F.2d 282, 284 (C.A.D.C. 1966).

We respectfully urge that the jurisdictional question should not be resolved simply on the basis of the earlier quoted language from Regents. In the following section of our brief we discuss those sections of the Communications Act on which the Commission relies for its claimed jurisdiction and which were accepted by the District of Columbia Circuit. We believe that construed in light of National Broadcasting Co. and Pottsville these statutory provisions confer on the agency the jurisdiction asserted.

C. Since CATV Systems Are Engaged In Interstate Communication By Wire Or Radio, They Fall Within The Ambit Of The Commission's Regulatory Authority.

The Communications Act directs the Commission to provide "a rapid, efficient, Nation-wide and worldwide wire and radio communications service * * *," 47 U.S.C. §151. It applies to "all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or transmission of energy by radio. * * *" 47 U.S.C. §152. To achieve the goals of the Act, the Commission is directed inter alia, to establish "areas or zones to be served by any [broadcast] station," 47 U.S.C. §303(h), to issue broadcast licenses to "provide a fair, efficient and equitable distribution of radio service" to the states and communities of the United States, 47 U.S.C. §307(b), and to promulgate rules and regulations to effectuate its responsibilities.

47 U.S.C. §§154(i), 303(f), (r).

Under Section 3(a) of the Act, 47 U.S.C. §153(a), wire communication is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, * * * including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." In light of the service offered, it is clear that CATVs are engaged in communication by wire within the meaning of the Act. And see also 47 U.S.C. 153(b) which defines a "radio communication" as "the transmission by radio of * * * pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services * * * incidental to such transmission."

It is clear also that CATVs engage in interstate transmissions under Section 3(e). This is so because the transmission of a television station is in interstate commerce, Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266 (1933); Fisher's Blend Station, Inc. v. State Tax Commission, 297 U.S. 650 (1936). And the extension of such an interstate communication by a CATV is part of the interstate transmission, even though the extension itself be entirely within one State. Buckeye Cablevision, Inc. v. Federal Communications Commission, supra; Idaho Microwave, Inc. v. Federal Communications Commission, 352 F.2d 729 (C.A.D.C. 1965); Ward v. Northern Ohio Telephone Co., 300 F.2d 816 (C.A. 6, 1962), cert. den. 371 U.S. 820.

CATVs are clearly a link in the transmission of television signals to the public. They are elaborate distribution systems whereby signals may be carried hundreds of miles beyond their point of origin and delivered to subscribers far beyond the normal range or service area of the stations involved. This finding is in accord with court holdings in which the question has been considered. Thus in United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (D.C.S.D. N.Y. 1966), affirmed Fortnightly v. United Artists, 377 F.2d 872 (C.A. 2, 1967) an action for infringement of copyright, the Court stated:

The term "community antenna," as used by defendants for self-description, is a misnomer and reflects a fundamental misconception. Defendant's two systems are not "community" ventures. They are large-scale commercial enterprises, advertising and promoting television programs, and making profit out of the exploitation of television programs, including plaintiff's copyrighted motion pictures. Nor are defendant's operations simply that of passive "antennas" used only to receive telecasts. In fact, defendant's two systems among other processes, receive, electronically reproduce and amplify, relay, transmit and distribute television programs--operations requiring complex, extensive and expensive instrumentation. These systems function as wire television systems, only one of whose structural components consists of antennas. 255 F. Supp. at 180.

Likewise, the Court of Appeals in the Buckeye case described the system there as one which "receives programs which originate outside the state and retransmits them by cable to its customers." (Slip Op. p. 8, emphasis added.)

¹⁶ See also Idaho Microwave, Inc. v. Federal Communications Commission *supra* and Clarksburg Publishing Co. v. Federal Communications Commission, 225 F.2d 511, 517 (C.A.D.C. 1955).

Thus, in practical effect as well as in legal contemplation, CATV systems are a part of the transmission of the television signal to the public. This being so, and in recognition of the Commission's "comprehensive powers to promote and realize the vast potentialities of radio," National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943), the Commission clearly has the authority to prescribe by rule the conditions under which a television signal may be extended through the medium of a community antenna system, in order to prevent frustration of the Congressional scheme of television regulation, in particular the mandate of sections 307(b) and 303(s).^{17/}

Petitioner contends (Pet. Br. 21-26) that the Commission has two principal and separate functions--to regulate communications common carriers and to license radio stations--and that since a CATV system is neither a common carrier nor a radio station, its activities are beyond the Commission's concern under the statute. This view, we believe, too narrowly construes the Congressional mandate. The Communications Act expressly states that its provisions "shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all

^{17/} This section authorizes the Commission to require all television receivers shipped in interstate commerce to be capable of receiving UHF signals. Enacted in 1962, it represents clear Congressional approval of the policy decisions underlying the Table of Allocations, 47 CFR 73.606, adopted by the Commission to fulfill the mandate of Section 307(b). See H. Rept. No. 1559, 87th Cong., 2d Sess., p. 3 (1962). Its relation to the CATV policy adopted by the Commission is set forth in the Notice and Second Report.

persons engaged within the United States in such communication or such transmission of energy by radio * * *, 47 U.S.C. §152(a). Congress did not provide that by "interstate communication by wire" it meant only interstate communication by wire "by a common carrier," and there is no reason to imply such an intent. If Congress had meant only wire communication by common carriers, it would not have referred to "all" interstate communications.

Moreover, Congress stated in Section 1 of the Act, 47 U.S.C. 151 that its intent was not only to "centralize authority heretofore granted" to other agencies but also to grant "additional authority with respect to interstate commerce in wire and radio communication." This change in the law was for the purpose of "securing a more effective execution" of national communications policy. Thus the avowed intendment of the Act as expressly stated in Section 1 negates petitioner's argument that the only accomplishment of the legislation was to consolidate the common carrier functions of the Interstate Commerce Commission and the licensing functions of the Federal Radio Commission. Under the circumstances, petitioner's resort to legislative history^{18/} to establish a different view is not only unnecessary but improper. United States v. Missouri Pac. R. Co., 278 U.S. 269 (1929). Elm City Broadcasting Co. v. United States, 235 F.2d 811 (C.A.D.C. 1956).

But even if the statute were not so clear, the legislative

^{18/} Valley Vision's Br. pp. 21-24.

history on which petitioner relies is not persuasive. The bill as finally enacted did not include the sharp functional division of the Commission's powers as petitioner argues. Instead, the Act is a comprehensive scheme for the regulation of interstate communication and constituted "the response to a Presidential message calling to the attention of Congress the disjointed exercise of federal authority over the forms of communication. The primary purpose of the Act was to create a commission 'to regulate all forms of communication * * *'" H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3.355 H.S. at 104 n. 14. The legislative history, like the language of the Act itself, demonstrates that Congress intended not merely to effect a reshuffling of two regulatory activities to place them under one authority for administrative purposes, but rather, to establish a cohesiveness and uniformity in the handling of all interstate communications matters which had until that time been lacking.

In affirming the Commission's jurisdiction over CATVs, the Court of Appeals for the District of Columbia relied on the expressed objectives of the Communications Act and the specific mandate given therein to the Commission. In addition, it acknowledged that soundness of the Commission's conclusion that further unregulated growth of CATV represents a substantial economic threat to licensed television stations and to the allocations system established by the Commission. And finally it pointed to the substantial body of case law, both in the communications field and in other areas, which recognizes the implied authority of the expert agency to deal with

aligned activities affecting the regulatory scheme and grants to it sufficient latitude to cope with new developments in the industry it was established to regulate.^{19/} The Southwestern opinion did not address itself to any of these considerations since the Court in that case felt that Regents v. Carroll was dispositive. We respectfully urge that with due regard for the language in that case the weight of authority, both statutory and judicial, supports the Commission's assertion of jurisdiction.

^{19/} See e.g. National Broadcasting Co. v. United States, supra; American Trucking Assoc. v. United States, 344 U.S. 298 (1953); Niagara Mohawk Power Corp. v. Federal Power Commission, 379 F.2d 153 (C.A.D.C. 1967).

III. THE COMMISSION CLEARLY HAS AUTHORITY TO ISSUE
CEASE AND DESIST ORDERS AGAINST CATV SYSTEMS
WHICH HAVE VIOLATED VALID REGULATIONS.

Petitioner advances the argument (Pet. Br. 29-37) that the Commission does not possess the power to issue cease and desist orders against non-licensees of the Commission. This argument is predicated almost entirely on language found in the Congressional Committee Reports which accompanied the 1952 amendments to the Communications Act. However, to conclude from this language that the Commission's Section 312(b) cease and desist power is limited to licensees is to ignore the plain language of the statute, the import of cases decided thereunder, and the basic scheme of the Act.

The extensive quotes from the Committee Reports set out by petitioner (Pet. Br. 30-34) all speak to the principal reason for granting cease and desist power to the Commission, i.e., that revocation was then the only administrative sanction available against licensees and a less harsh remedy was needed. But nowhere in the Committee Reports is it stated that cease and desist orders were intended to be issued only against licensees. In fact, the plain language of the statute runs contrary to petitioner's assertions. Thus, Section 312(b) begins "Where any person . . .", and Section 312(c) refers to "licensee, permittee, or person." It is a basic rule of statutory construction that where the language of the statute is clear and unambiguous, it is presumed that the legislature meant what it said. 82 C.J.S. Statutes, §316(b); United States v. Goldenberg, 168 U.S. 95 (1897); Jeanese, Inc. v. United States, 227 F. Supp. 304 (N.D. Cal., 1964), reversed on other grounds, 341 F.2d

502 (C.A. 9, 1965). It is also presumed that every word is intended for some purpose. 82 C.J.S. Statutes, §316(b); Pacific Gas and Electric Co. v. Securities and Exchange Commission, 139 F.2d 298 (C.A. 9, 1943), affirmed 324 U.S. 826, rehearing denied 324 U.S. 890 (1945). The word "person" appears together with "licensee" in Section 312(b) and obviously means something different. We therefore submit that on the basis of the statute alone petitioner's argument must be rejected.

Further support for our contention is found in those cease and desist orders against non-licensees which have been appealed to the courts. Most to the point are two recent decisions of the Court of Appeals for the District of Columbia Circuit wherein the Commission's issuance of cease and desist orders against CATV system operators for rule violations was affirmed. Booth American Company v. Federal Communications Commission, 374 F.2d 311 (C.A. D.C., 1967); Buckeye Cablevision, Inc. v. Federal Communications Commission, Case No. 20,274, decided June 30, 1967.^{20/} Even the case cited by petitioner (Pet. Br. 34) supports the Commission's view, C. J. Community Services, Inc. v. Federal Communications Commission, 246 F.2d 660 (C.A. D.C., 1957). In that case, the Commission had issued a cease and desist order against a non-licensee (an unlicensed booster station), and the court reversed the Commission. But the ground for reversal was not that the non-licensee could

^{20/} Southwestern Cable v. United States of America and Federal Communications Commission, 378 F.2d 118 (C.A. 9, 1967) cited by petitioner (Pet. Br. 28 n.25) did not involve the issuance of a Section 312(b) order.

not be reached by a cease and desist order;^{21/} rather, it was that the Commission had discretion under the statute as to whether such an order should issue even where the rule violation is clear (the Commission had held that it had no discretion). The portion of the concurring opinion quoted by petitioner also concerns the question of the Commission's discretion to issue an order and does not, as petitioner appears to allege, decide the question of the Commission's power to issue cease and desist orders against non-licensees.

If, as we assert, supra, a CATV operator is subject to the Act, he is clearly a "person" for Section 312(b) purposes. CATV is an integral part of the broadcasting distribution system, and the Commission, pursuant to its "authority to establish areas or zones to be served by any station" (§303(h)) and its duty to "provide a fair, efficient, and equitable distribution of radio service" (§307(b)), has promulgated rules to promote the integration of CATV service with television broadcast stations so as to serve the overriding public interest in the advancement of a nationwide broadcasting system. The administrative sanction of

^{21/} It is noteworthy that in the court's discussion of the Commission's authority over booster stations, a footnote reference was made to "Can Community Antenna TV Be Enjoined?", 20 Albany Law Review 69 (1956), 246 F.2d at 663 n.4. This article discusses the various possible methods of stopping a CATV from using a station's programs. One method mentioned is the use of a Section 312(b) cease and desist order in the event that the Commission asserts jurisdiction over CATV.

a cease and desist order is provided in Part III of the Act to insure compliance with regulations adopted thereunder. As we have stated above, the CATV rules have been adopted pursuant to Part III of the Act to promote the equitable allocation scheme which the Commission is directed to maintain. The power to issue cease and desist orders is manifestly a part of the statutory framework for enforcing such rules. Booth American Company v. Federal Communications Commission, supra; Buckeye Cablevision, Inc. v. Federal Communications Commission, supra.

IV. NOTHING IN THE COMMISSION'S CONDUCT OF THE CEASE AND DESIST PROCEEDING HEREIN WAS UNFAIR TO PETITIONER OR DENIED IT DUE PROCESS.

Petitioner's final argument (Pet. Br. 37-42) is that the Commission's cease and desist proceeding was "arbitrary, capricious, and denied petitioner procedural process." This sweeping indictment of the Commission's action actually consists of five sub-arguments. We will show below that none of these is meritorious.

Petitioner's chief assertion is that the Commission erred in failing to consider its engineering evidence, consisting of measurement data, which purportedly shows that Placerville is not located within the Grade A contours of any commercial television station situated in a top 100 market, in particular, Sacramento. Petitioner asserts that the acceptance of such a showing would mean that its CATV system is not subject to the hearing requirements of the distant signal rule. However, as the Commission's opinion thoroughly explains (R. 183-185), Section 74.1107 contemplates use of the

"predicted" Grade A contour as its standard. In its Second Report and Order, the Commission explained the reason for its selection of the predicted rather than a measured contour, stating (2 F.C.C. 2d at 783 n. 63):

"For clarification . . . [w]e have employed the grade A contour of any station since, while stations often are located at different sites or have different powers or heights (and thus different A contours), these grade A service areas in the same market have a tendency of becoming fairly close to one another over a period of time. In any event, we think that this is an appropriate criterion since it encompasses the essential area upon which new UHF broadcast operations in the market would be based, without including the much larger areas falling within the grade B contours, as has been urged by some in this proceeding. Because our effort is to carve out such an essential area upon which new UHF development would be vitally based, we have employed the predicted grade A contour; use of the predicted contour should also have the advantage of definiteness and easier administration. In the unusual instance where the requirement may be inappropriate, waiver can be sought. . . ."

The "predicted" Grade A contour is computed by using the method set out in Sections 73.684(c) and (d) of the Commission's Rules, 47 CFR 73.684(c) and (d), while petitioner's proffered showing is a "supplemental showing" as referred to in Section 73.684(f), 47 CFR 73.684(f). As indicated in the just quoted material, it is quite clear that the Commission intended the former method to be used for purposes of Section 74.1107. On this basis, petitioner's Placerville CATV system is within the Grade A contours of the Sacramento stations and the distant signal rule is applicable. If, in fact, petitioner can make a valid "supplemental showing" that the Sacramento Grade A contours do not cover Placerville, this

is a relevant factor to be considered in the context of a waiver request.

In the same vein, petitioner asserts that the Commission erred in refusing, at the time of the hearing on the show cause order, to hear any evidence on petitioner's waiver request. It is clear, however, that consideration of such evidence has not been barred but has simply been deferred until the hearing called for by Section 74.1107. It is well-settled that the Commission has wide discretion to control the scope of its proceedings and to establish the priorities as to the manner in which its business will be conducted. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); Federal Communications Commission v. Taft Schreiber, 381 U.S. 279 (1965). The Commission has made a policy judgment, applicable to all systems similarly situated, that compliance with the rules must be obtained before requests for relief are considered. Buckeye Cablevision, Inc., 3 F.C.C. 2d 808, 810-811 (1966). The considerations underlying this judgment are manifestly reasonable. The Commission found that such a course was dictated by requirements of orderly procedure, fairness to those systems which comply with the rules, and out of consideration for potential subscribers whose service would be substantially disrupted if it was ultimately found that the importation of distant signals was contrary to the public interest. Clearly, the Commission's judgment involves no abuse of discretion. The Court of Appeals for the District of Columbia has squarely so held.

Booth American Company v. Federal Communications Commission, supra;
Buckeye Cablevision, Inc. v. Federal Communications Commission, supra.

Petitioner alleges that it had only 25 days advance notice of the show cause hearing whereas Section 312(c) of the Act requires 30 days notice. The short answer to this contention is that petitioner has simply counted the days from the wrong date. The statute states that the hearing date must be no less than thirty days from the "receipt" of the show cause order. The certified mail receipts show that the show cause order and the simultaneously released order designating the time and place of hearing were received by petitioner on March 1 and February 20, 1967, respectively. The hearing date as originally set was April 18, and it was later advanced to April 3. Both dates obviously comply with the 30 day requirement. Petitioner erroneously computes the days from March 8, the date of the order moving the hearing date to April 3. This is patently wrong.

Petitioner complains that it was only given 7 days after the conclusion of the hearing within which to file proposed findings of fact and conclusions of law. It stated before the Commission that the time was too short and that it required the 20 days normally provided in Section 1.263 of the Commission's Rules, 47 CFR 1.263. However, this was not the normal case. The Commission stated in the show cause order (R. 22):

In the Second Report and Order we indicated that we would act expeditiously in the event of a violation of Section 74.1107 of the Rules. Since the public

interest requires that the situation in Placerville be resolved as soon as possible, the Commission finds that due and timely execution of its functions imperatively and unavoidably require that the Examiner certify the record in this matter, upon its closing, immediately to the Commission for final decision. Expedition also requires that the parties file their proposed findings of fact and conclusions of law within seven (7) calendar days after the date the record was closed.

The Commission reiterated this conclusion in its order denying petitioner's appeal from the hearing examiner's refusal to extend the time (R. 180). It was in light of the policy considerations in the Second Report and Order that the Commission considered the need for expeditious adjudication in this proceeding (2 F.C.C. 2d at 781). At the time the show cause order in regard to petitioner's operation was adopted, the information before the Commission indicated that petitioner had commenced operation of a CATV system in one of the top 100 television markets after February 15, 1966, and was extending the signals of certain stations beyond their Grade B contours by transmitting such signals to its subscribers without first requesting or obtaining Commission permission. Petitioner gave no indication that it would voluntarily cease the proscribed operation until Commission consent was obtained. The Commission properly concluded that it could not permit this case to go through the regular hearing process and still accomplish its objective of preventing CATV systems carrying distant signals from becoming entrenched before taking effective action. This determination was a reasonable exercise of the Commission's discretion.

Finally, petitioner alleges that it was somehow error for the Commission's Broadcast Bureau to participate in the hearing. In a cease and desist proceeding, the burden of proof is on the Commission. Thus some arm of the Commission must participate as a party. It is therefore unnecessary for the appropriate arm to file a motion to intervene; it need only note an appearance. The question of which arm of the Commission is the proper participant is simply a matter of internal Commission procedure. One of the functions of the Commission's Broadcast Bureau is to participate in "hearings involving applications, rule making, and other matters which pertain to the radio broadcast services." Section 0.71(d) of the Rules, 47 CFR 0.71(d). As a matter of administrative convenience, the CATV Task Force requests the Broadcast Bureau, which has a special hearing division, to represent it (and the Commission) at hearings such as the one in this case. This argument appears singularly without merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court has no jurisdiction over this proceeding and should therefore transfer it to the Court of Appeals for the District of Columbia, but in the event that this Court takes jurisdiction, the Commission's assertion of jurisdiction over community antenna television systems and the Commission's issuance of a cease and desist order against a CATV system for violation of valid regulations should be affirmed.

Respectfully submitted,

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October 27, 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Stuart F. Feldstein

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,063

VALLFY VISION, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

On Appellant's Motion to Dismiss

Decided September 6, 1967

Messrs. Lauren A. Colby and Gennaro Caliendo were on appellant's motion to dismiss.

Messrs. Henry Geller, General Counsel, Federal Communications Commission, *John H. Conlin*, Associate General Counsel, and *Robert D. Hadl*, Counsel, Federal Communications Commission, were on appellee's answer to the motion to dismiss. *Mrs. Leonore G. Ehrig*, Counsel, Federal Communications Commission, also entered an appearance for appellee.

Before *WILBUR K. MILLER*, *Senior Circuit Judge*, and *WRIGHT*, and *LEVENTHAL*, *Circuit Judges*.

PER CURIAM: The Federal Communications Commission ordered appellant to cease and desist from the continued carriage of "distant signals" on its CATV system in Placer-ville, California. Prior to noting an appeal in this Court under § 402(b) of the Communications Act,¹ appellant

¹48 Stat. 926 (1934), as amended, 47 U.S.C. § 402(a) (1964).

instituted an appeal in the Court of Appeals for the Ninth Circuit under § 402(a) challenging the same decision of the Commission. The Ninth Circuit has issued an interlocutory injunction staying the effectiveness of the Commission's order. Appellant now requests that we dismiss his appeal so that he may prosecute the entire matter in the Ninth Circuit.

We do not dismiss but yield *sua sponte* to the Congressional intent that an administrative action be reviewed only by the Court of Appeals in which proceedings were first instituted. 28 U.S.C. § 2112(a).² We do so despite our belief that the District of Columbia Circuit has exclusive jurisdiction to review the challenged order. The Federal Communications Commission has the power to issue cease and desist orders pursuant to § 312 of the Communications Act to enjoin violations of the CATV regulatory scheme. See *Buckeye Cablevision, Inc. v. Federal Communications Commission*, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 20,274, decided June 30, 1967); *contra*, *Southwestern Cable Co. v. United States*, ___ F.2d ___ (No. 21,183, 9th Cir., decided April 28, 1967). Under § 402(b)(7) the Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review Federal Communications Commission cease and desist orders.³

To avoid any possibility of misunderstanding, our action today transferring the appeal to the Court of Appeals for the Ninth Circuit is in deference to § 2112(a) and the need for avoiding unseemly conflict, and does not signal that we

²See *Eastern Air Lines, Inc. v. CAB*, 122 U.S. App. D.C. 375, 354 F.2d 507 (1965); *Ball v. NLRB*, 299 F.2d 683 (4th Cir.), *cert. denied*, 369 U.S. 838 (1962).

³See, e.g., *Tomah-Mauston Broadcasting Co. v. FCC*, 113 U.S. App. D.C. 204, 306 F.2d 811 (1962); *Functional Music, Inc. v. FCC*, 107 U.S. App. D.C. 34, 274 F.2d 543 (1958), *cert. denied*, 361 U.S. 813 (1959). Cf. *Helena TV, Inc. v. FCC*, 269 F.2d 30 (9th Cir. 1959).

are receding from our view that the case properly belongs in the District of Columbia Circuit.

It is so Ordered.

Senior Circuit Judge Miller did not participate in the foregoing opinion.

Nos. 21,869 and 21,870
United States Court of Appeals
For the Ninth Circuit

VALLEY VISION, INC.,

Petitioner,

VS.

FEDERAL COMMUNICATIONS COMMISSION,
and UNITED STATES OF AMERICA,

Respondents.

On Petitions to Review Decision and Orders of the
Federal Communications Commission

REPLY BRIEF FOR PETITIONER

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Nos. 21,869 and 21,870

**United States Court of Appeals
For the Ninth Circuit**

VALLEY VISION, INC.,

Petitioner,

VS.

FEDERAL COMMUNICATIONS COMMISSION,

and UNITED STATES OF AMERICA,

Respondents.

**On Petitions to Review Decision and Orders of the
Federal Communications Commission**

REPLY BRIEF FOR PETITIONER

ARGUMENT

**A. THE VENUE OF THIS PROCEEDING
PROPERLY LIES IN THIS COURT**

Much of the Government's brief is devoted to the argument that this Court possesses no jurisdiction to hear this appeal because, in the Government's view, jurisdiction is vested exclusively in the United States Court of Appeals for the District of Columbia Circuit. Although Petitioner has already discussed the matter of venue in its original brief, a few more words will be said here in response to the Government's contentions.

Although it is true, as the Government points out, that Section 402(b) of the Communications Act provides for appeal in the District of Columbia Circuit by “persons” against whom a cease and desist order has been issued, it does not follow that the Petitioner in the instant case is required to take its appeal in that Circuit. In the first place, although the Commission purported to have issued a cease and desist order against the Petitioner, that cease and desist order was a worthless nullity, because the Commission had no authority to issue it against Petitioner, a non-licensee who had never subjected itself to the Commission’s jurisdiction. This is not a case where a valid and enforceable cease and desist order has been properly served on a Commission licensee, and said licensee is seeking to litigate the propriety of the procedures which led to the issuance of the Order.¹ Rather, Petitioner has shown that the Order issued by the Commission in this case was a legal nullity; it did not, in legal effect, ever issue, because the Commission had no authority to issue it. *Southwestern Cable Co. v. FCC and USA*, 378 F 2d 118 (1967).

Secondly, Petitioner is not a “person” upon whom a cease and desist order has been served, within the meaning of the statute. For as used in the statute, the term “person” means “licensee”—something which Petitioner is not.

That the term “person” was intended to refer only to licensees is clear from the statutory history of the

¹Although, as Petitioner has pointed out in its brief, those procedures were grossly lacking in due process.

Communications Act, and from the interpretations placed on the Act by the Courts. The original language of Section 402 (b) of the Communications Act, as adopted in 1934, is reproduced in the Appendix to this Reply Brief. That language restricted the categories of appeals to be taken in the District of Columbia Circuit to three categories: namely, appeals by persons whose applications for construction permits or licenses had been denied, appeals by persons aggrieved by grant or denial of such applications, and radio operators whose licenses were denied. Thus, it was clear that the framers of the Act intended to restrict the cases to be heard in the District of Columbia Circuit to those cases involving the Commission's licensing functions. In fact, Senator Dill—one of the leading lights in the framing of the legislation—commented specifically on this point in the Senate Report as follows:

“Where a licensee desires to appeal from orders of the Commission affecting his interest, but which he did not originate, he may file his appeal in the three-judge district court in the jurisdiction where he lives. In those cases where he has applied to the Commission for an order and desires to appeal from the Commission's action, he must come to Washington, D.C. to prosecute his appeal, just as he came to Washington, D.C. to ask for the order.

“In fact, appeals from refusals of applications by the Commission could not be prosecuted in the federal district courts anyhow, and must be prosecuted in the courts of the District of Columbia.

“Your committee believes that this appeal section is eminently fair. In nearly all cases in which the Commission makes an order affecting a licensee which the licensee did not seek, the Commission must go to the district court having jurisdiction of such licensee. Where an applicant or a licensee comes to the District of Columbia and applies for an order, he must take his appeal in the courts of the District of Columbia.” *Senate Report No. 781*, 73rd Congress, 2nd Session, pages 9, 10. Submitted by Senator Dill of the Interstate Commerce Committee.

And as if to drive the point home, he added in remarks on the floor of the Senate that:

“I desire to call attention to what I think is an important fact to consider in this appeal provision. Those owners of radio broadcasting stations living long distances from the District of Columbia should not be required to come to Washington to prosecute an appeal from a decision for which they were not responsible. When I say ‘were not responsible’ I mean a decision which was granted against them or affecting them when they did not bring the case into court . . . so we provide that where the decisions of the Commission are made in cases wherein the stations took no part in beginning the suits, appeal may be taken in the three-judge district courts in the jurisdictions where the stations are located. But in the case where the applicant for the license or the permit, or whatever it may be, comes to the Commission and asks for something to be done by the Commission, then if the Commission makes a decision from which he desires to appeal he must make his appeal in the courts

of the District of Columbia.” 78 Cong. Rec. 8825-26. Cf. *Sen. Rep. No. 781*, 73rd Cong., 2d Sess., pp. 9-10, cited by the U.S. Supreme Court in *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 8 (1942).

In 1952, the Congress amended Section 402 of the Communications Act to add Section 402(b)(7), which provides for appeals in the District of Columbia Circuit by persons against whom a cease and desist order had been issued. In so doing, however, Congress never intended to deviate from the established principal that only appeals from cases involving the Commission’s *licensing* functions would have to be taken in D.C. The Senate Report on the Communications Act amendments, 1952, *Senate Report No. 44*, 82nd Congress, 1st Session, submitted January 25, 1951, by Mr. McFarland makes this crystal clear. It states, in relevant part, at page 11, that:

“Subsection (a) deals only with judicial review of Commission orders by specifically constituted three-judge courts. It substantially restates existing law with necessary clarification, and a provision is inserted which would give parties plaintiff, other than the Government, an option of venue for district court or in the United States District Court for the District of Columbia. *Subsections (b) through (j) deal with the subject of judicial review of decisions and orders of the Commission which are entered in the exercise of its radio-licensing functions.*

“Subsection (b) attempts a more precise and comprehensive definition of the jurisdiction of the

United States Court of Appeals for the District of Columbia in cases appealed from the Commission. The language of this subsection, when considered in relation to that of subsection (a), *also would make clear that judicial review of all cases involving the exercise of the Commission's radio-licensing function power is limited to that Court.*" (Emphasis supplied.)

The House Report on the 1952 Communications Act amendments, submitted by Mr. Harris, reaffirms the same point. It states, at page 16, that:

"In specifying, in Section 402 (b), the orders and decisions which may be reviewed only by the United States Court of Appeals for the District of Columbia, the committee amendment follows the *existing provisions of law rather closely*, the principal differences being such as are necessary to conform to amendments made by other sections of the committee amendment." (Emphasis supplied.)

The Government's brief makes much of the decision of the two judges² of the District of Columbia Circuit, dismissing an appeal filed by Petitioner in that Circuit, and expressing the "belief" that exclusive jurisdiction over this case rests in Washington. Aside from the fact that the panel's remarks were *obiter dicta* and are not binding on this Circuit, they also represent a marked departure from past practice in the District of Columbia Circuit and may well fail

²There were three judges on the panel, but one did not participate.

to reflect the opinion of a majority of the Judges of that Circuit. For all of the reported cases in the District of Columbia Circuit have previously followed the intent of Congress that only appeals from cases involving the Commission's *licensing* functions must be taken there.³ *Booth American Company v. FCC* and *Buckeye Cablevision, Inc. v. FCC* are not contrary to that general proposition. Those cases dealt only with the question of the Commission's general jurisdiction over CATV, and never reached the question of whether the Commission possessed the statutory power to issue cease and desist orders against non-licensees.

B. THE "CEASE AND DESIST" PROVISIONS OF SECTION 312(b) OF THE COMMUNICATIONS ACT WERE NEVER INTENDED TO APPLY TO NON-LICENSEES

The Commission's attempt to distinguish the case of *Regents v. Carroll* on the grounds that it was decided before Congress gave the Commission the power to issue cease and desist orders overlooks the legislative history, which makes it clear that the cease and desist order power was never intended to be exercised against anyone except Commission licensees. That history was set forth in detail in Petitioner's original

³E.g. *Rhode Island Television Corporation v. FCC*, 320 F.2d 762 (D.C. Circuit 1963); *Tomah-Mauston Broadcasting Co., Inc. v. FCC*, 306 F.2d 811 (D.C. Circuit 1962); *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Circuit 1958); *Jacksonville Journal Company v. FCC*, 246 F.2d 699 (D.C. Circuit 1957); and *O'Neill Broadcasting Company v. USA and FCC*, 241 F.2d 443 (D.C. Circuit 1956).

brief and will not be repeated here. Suffice to again point out that the Senate Report on Section 312(b) specifically stated that "The cease and desist action would apply to those cases where a *licensee* has (1) failed to operate substantially as set forth in his *license*; (2) failed to observe the restrictions of this Act or of a treaty ratified by the United States; and (3) violated or failed to observe any rule or requirement of the Commission authorized by this Act" (emphasis supplied).⁴

**C. THE PROCEEDINGS BEFORE THE COMMISSION
WERE GROSSLY UNFAIR AND ARBITRARY**

Finally, a few more words should be said concerning the Commission's attempts to justify the arbitrary and grossly inadequate proceedings which it conducted before issuing the cease and desist order against the Petitioner.

At page 6 of its Brief, the Government points out correctly that the "Grade A Contour defines the area at the perimeter of which a good picture is received for 90% of the time at the best 70% of locations". If this be true (which it is) and if the location of the Grade A contour of the Sacramento stations determines whether the Petitioner complies or doesn't comply with the Commission's Rules (which it does), it would seem that the Commission would have been

⁴S.R. No. 44, 82d Cong., 1st Sess. (1951). I *Pike and Fischer* RR 10:282.

very interested in finding out just where the Grade A contour of the Sacramento stations was located. But strangely, the Commission's Broadcast Bureau and Hearing Examiner seemed monumentally disinterested in that question. Although everybody admits that the "predicted" method of locating the contour is only an inaccurate "guestimate", the Commission authorities stubbornly refused to receive evidence preferred by Petitioner to show, by actual measurement, where the contour was really located.

Perhaps this was because the case was prosecuted by representatives of the Commission's Broadcast Bureau, which is concerned with the regulation of the interests of television stations and their owners, not CATV systems. Had representatives of the Commission's CATV Task Force been present, they might well have been more inclined to get at the real facts, instead of relying upon an admittedly incorrect estimate of the location of the contour, in order to reach a desired result.

D. CONCLUSION

In conclusion, there is nothing in the Government's Brief to warrant denial of the relief requested by Petitioner. The cease and desist order issued by the Commission should be vacated and set aside.

Dated, December 11, 1967.

Respectfully submitted,

LAUREN A. COLBY,

*Counsel for Petitioner
Valley Vision, Inc.*

HALLEY, HEAD, LA FORCE & MOORAD,
Of Counsel.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LAUREN A. COLBY,

Attorney for Petitioner.

(Appendix Follows)

Appendix

Appendix

Original language of Sections 402(a) and 402(b) of the Communications Act of 1934:

*“Proceedings to Enforce or Set Aside the
Commission’s Orders—Appeal in Certain Cases*

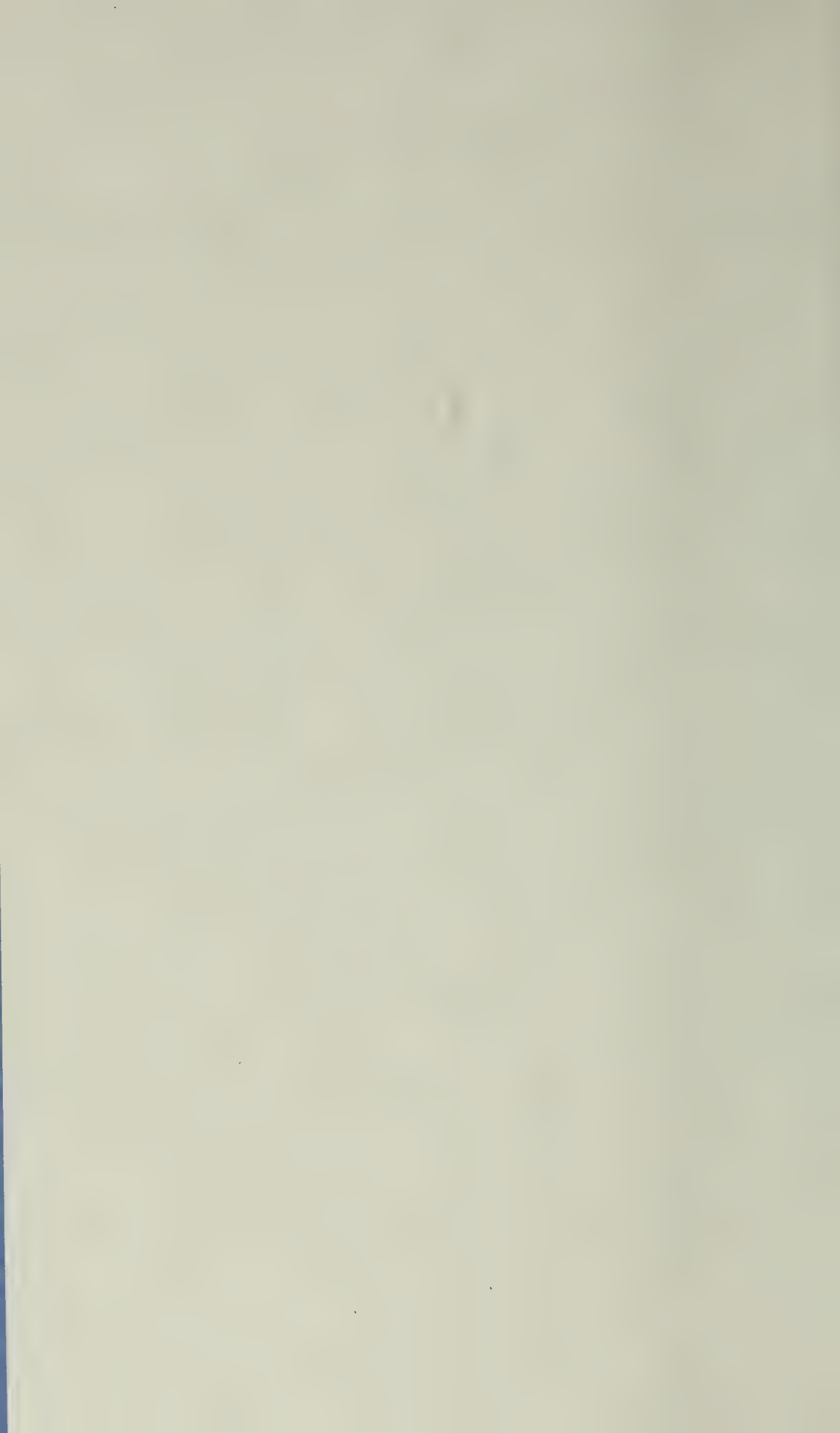
“Sec. 402. (a) of the provisions of Title 28 of the United States Code, relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator’s license), and such suits are authorized to be brought as provided in such Title 29.

“(b) An appeal may be taken, in the manner hereinafter provided, from decision of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

“(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

“(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

“(3) By any radio operator whose license has been suspended by the Commission.”



N O. 2 1 8 7 3 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT PARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

MAR 5 1968

WM. B. LUCK, CLERK

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N O. 2 1 8 7 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT PARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The appellant, Robert Parker, was indicted by the Federal Grand Jury for the Central Division of the Southern District of California on November 16, 1966. The indictment was brought under Title 18, United States Code, Sections 2113(a)(d)(e), and charged that the appellant had committed six armed bank robberies in the Los Angeles area. The indictment further charged that in each of the robberies appellant forced a hostage to accompany him to the bank in question and assist in the robbery.

On December 19, 1966, appellant pleaded not guilty to all

six counts of the indictment. On March 14, 1967, the case proceeded to trial on four of the six counts of the indictment. The Government dismissed the last two counts of the indictment prior to trial. Appellant was found guilty by a jury on all four counts of the indictment [C. T. 57]. 1/

Appellant was sentenced to serve a term of 25 years imprisonment on each of the four counts of the indictment [C. T. 117]. Appellant's notice of appeal was timely filed on April 17, 1967 [C. T. 111].

The jurisdiction of the District Court was based upon Title 18, United States Code, Sections 2113(a)(d)(e), 3231 and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294 and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTES INVOLVED

The indictment was brought under Title 18, United States Code, Sections 2113(a)(d)(e), which provides:

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or

1/ "C. T. " refers to Clerk's Transcript of Record.

money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

"Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny - shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

"(d) Whoever, in committing, or in attempting to commit, an offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

"(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany

him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct."

III

QUESTIONS INVOLVED

- A. Was appellant's pre-trial line-up so defective as to deprive him of due process of law?
- B. Should the testimony of Wilbur Robinson, Jr., have been excluded?
- C. Does the provision of the Bank Robbery Act imposing capital punishment if the jury so recommends, burden the assertion of appellant's right to trial by jury in violation of the Sixth Amendment?

IV

STATEMENT OF FACTS

On November 19, 1964, at approximately 10:30 A. M., appellant approached Mr. Jahan Anderson in a parking lot near the U. C. L. A. Medical Center in Westwood [R. T. 113(21)]. ^{2/} Appellant asked Mr. Anderson to give him a ride to Westwood Boulevard and Santa Monica. After driving a short while appellant

^{2/} "R. T." refers to Reporter's Transcript of the proceedings.

forced Mr. Anderson at gun point to pull to the side of the road stating that it was a stick-up [R. T. 113(22)]. Appellant forced Mr. Anderson to turn the car around and together they drove back into Westwood Village and parked next to the Bank of America. Appellant then told Mr. Anderson that "We are going to go into this bank" [R. T. 113(23)]. Next appellant pulled out a pillow case and handed it to Anderson. Appellant told Mr. Anderson that they were going to go into the bank and that Mr. Anderson was to jump over the teller's counter and put whatever money he found inside the pillow case [R. T. 113(25)]. Appellant told Mr. Anderson that if he tried to make any kind of an act or move he would kill him [R. T. 113(25)].

Appellant then forced Mr. Anderson to accompany him inside the bank. Once inside the bank appellant held his gun on those inside while Mr. Anderson collected the money for him [R. T. 113(26)]. Thereafter Mr. Anderson fainted and appellant fled with \$8,636.86.

On July 1, 1965, at approximately 10:30 A.M., appellant kidnapped Mr. Clyde Brooks and forced Mr. Brooks to accompany him to the Bank of America on Jefferson and Hill in Los Angeles [R. T. 181]. Appellant handed Mr. Brooks a pillow case and told him that once they were inside the bank Mr. Brooks was to jump over the teller's cage and collect the money [R. T. 182]. Once inside the bank Mr. Brooks refused to collect the money for appellant [R. T. 183]. Appellant collected the money himself and fled with \$3,339.00.

On October 28, 1965, appellant kidnapped Mr. Earl T. Poke while Mr. Poke was stopped at the intersection of Western Boulevard and Adams Boulevard in Los Angeles [R. T. 387]. Appellant handed Mr. Poke a pillow case and indicated that Poke was to assist him in robbing the Security First National Bank at Sixth and Oxford in Los Angeles [R. T. 389]. Appellant forced Mr. Poke to drive him to the bank. Once inside appellant forced Mr. Poke to collect cash from the teller's boxes for him [R. T. 390]. Appellant fled with \$2,859.00.

On March 15, 1966, appellant kidnapped Mr. Annis Evans [R. T. 341] at gun point and forced Mr. Evans to drive him to Security-First National Bank on Adams and Crenshaw in Los Angeles. Outside the bank appellant handed Mr. Evans a pillow case [R. T. 396] and told him that he was going to collect the money from the tellers' drawers [R. T. 347]. Once inside the bank appellant forced Mr. Evans to collect the money from the tellers' drawers and, thereafter, appellant fled with \$2,400.00.

On October 17, 1966, at approximately 11:00 P. M., Mr. Wilbur Robinson, Jr. left his place of employment to drive home for lunch [R. T. 432]. On the corner of 29th Avenue and Cimarron Mr. Robinson first noticed appellant crossing the street [R. T. 433]. Appellant asked Mr. Robinson for a ride to Arlington Avenue. Shortly after appellant entered the car he forced Mr. Robinson to pull over to the curb and pulled a gun on him. Appellant told Mr. Robinson that he was going to take appellant somewhere and that if he did as he was told he wouldn't get hurt [R. T. 434]. Appellant

forced Mr. Robinson to drive him to the parking lot of the Bank of America on Pico and La Cienega [R. T. 436]. Upon arriving at the parking lot appellant told Mr. Robinson that they were going to rob the bank. Appellant handed Mr. Robinson a pillow case and explained to him that he was to empty all the tellers' cages [R. T. 436]. As the two men walked down Pico Boulevard toward the bank Mr. Robinson threw the pillow case into the air to distract appellant. At the same time Mr. Robinson grabbed appellant from behind and after a battle which extended into an adjacent parking lot, Mr. Robinson succeeded in subduing appellant and holding him until the police arrived [R. T. 439, 440].

Thereafter, a bank security guard found a loaded .38 caliber revolver near the place where the fight had occurred [R. T. 494]. At the police station a search of appellant produced six .38 caliber bullets [R. T. 512].

After appellant's arrest he was placed in a lineup at the Los Angeles Police Department [R. T. 143, 144]. Approximately 150 to 200 people attended the lineup [R. T. 313]. There were ten individuals in the lineup of which at least four and possibly seven were Negroes [R. T. 169, 313]. The witnesses sat down in an auditorium and were given instructions by the police officials. They were told to be seated and that if they had any questions to remember what they were and to ask them when the lineup was over [R. T. 313].

After the lineup was concluded the witnesses filled out a card indicating the individual that they had identified [R. T. 139,

314]. The witnesses had no discussion between themselves respecting the lineup during the time the lineup was being conducted [R. T. 142]. The witnesses only discussed the lineup and the participants after the identifications were completed [R. T. 142, 173, 314]. Appellant did not have counsel at this October, 1966 lineup. None was ever requested.

V

ARGUMENT

A. APPELLANT'S PRE-TRIAL LINEUP
PLAYED A NEGLIGIBLE PART IN
HIS IDENTIFICATION AND IN NO
WAY DEPRIVED HIM OF DUE PRO-
CESS OF LAW.

Appellant contends that his pre-trial lineup was so unnecessarily suggestive and conducive to mistaken identification that he was denied due process of law. Before examining the nature and quality of the lineup in this case it is appropriate that the Court first be advised as to the types of identification relied upon by the Government so as to place this issue in a proper perspective.

During the course of the trial the Government called some fifteen witnesses to the stand all of whom made an in-court identification of the appellant as the man who robbed the respective banks alleged in the indictment. The record discloses that of these fifteen identification witnesses only five actually attended a lineup in which the appellant appeared [R. T. 123, 154, 312, 332, 361]. Nine

of the identifying witnesses had only seen photographs of appellant prior to their in-court identification [R. T. 113(35), 186, 225, 257, 280, 293, 298, 374, 403]. It was not determined how the remaining one witness had previously identified the appellant [R. T. 365].

Of particular note is the fact that four of the Government's identification witnesses were not the usual type of identification witness who is exposed to a criminal for but a short period of time during the actual commission of a crime. The Government produced four hostages whom appellant had kidnapped at gun point and had been in appellant's company listening to his directions and observing his actions for at least thirty minutes in most instances [R. T. 113(20), 184, 390]. Of these four hostages, only one attended a pre-trial lineup [R. T. 361]. The remaining three merely saw photographs of appellant, among others, prior to their in-court identification [R. T. 113(35), 186, 403].

In light of the overwhelming number of identifying witnesses who never participated in any lineup (nine) it is the Government's position that appellant was not denied due process of law in any way by the pretrial lineup where but five Government witnesses identified him. Clearly the doctrine of United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. United States, 388 U.S. 263 (1967) is inapplicable to the case at bar. Stovall v. Denno, 388 U.S. 293 (1967).

Finally, the identification made by Mr. Earl Poke, one of the hostages, is illustrative that the identifications of appellant met the standard set by the Supreme Court in Wade and Gilbert, supra,

in that the identifications were not the fruit of any earlier identifications made in the absence of appellant's counsel [R. T. 413].

"Q. BY MR. GLASSMAN: In Court on your direct testimony you have identified the defendant Robert Parker as the man who abducted you at the point of a gun on the day in question?

"A. Yes, Sir.

"Q. Is that identification based upon your observing him in this Court room this afternoon?

"A. Yes, Sir."

B. THE TESTIMONY OF WILBUR ROBINSON, JR. WAS ADMISSIBLE AS PROBATIVE EVIDENCE SHOWING APPELLANT'S MODUS OPERANDI AND ESTABLISHING THE IDENTITY OF APPELLANT.

Appellant argues that the testimony of Wilbur Robinson, Jr. was inadmissible because it was offered to show intent and the only issue in the trial was one of identity. A careful reading of the transcript indicates that Mr. Robinson's testimony was admitted to show appellant's modus operandi as well as to prove identity. The testimony was admitted to show that at the time of appellant's arrest he was once again engaging in the exact same course of conduct as that with which he was charged; i. e. abducting a hostage while hitchhiking, forcing him to drive appellant to a bank somewhat removed from the point of the abduction; explaining the details of assisting appellant to rob the bank in question;

handing the hostage a pillow case with which to collect cash from the teller's cages. The trial judge ruled that the testimony of Mr. Robinson was admissible "in view of the offer of proof that it is the identical modus operandi I will permit them to prove it."

[R. T. 429].

Proof of other crimes may be admitted to prove a continuing plan, system, or design by a defendant. Evidence of another crime is clearly admissible when the offense is logically connected with that charged, or the acts are so closely and inextricably mixed-up with the history of the guilty act itself as to form part of the plan or system or criminal action. United States v. Crowe, 188 F.2d 209, 212 (7th Cir. 1951). In the Crowe case, the Court stated that prior offenses offered to prove design or system must bear greater similarity and closer connection in time to the offense charged than when offered to prove intent or motive.

Evidence of another offense cannot be admitted to show a plan if the evidence shows an entirely different system or method of operation. Flood v. United States, 36 F.2d 444 (9th Cir. 1930), but in the case at bar appellant's actions in regard to Mr. Robinson were identical in every detail to the four offenses with which he was charged.

Mr. Robinson's testimony was also admissible to prove the identity of the defendant. 2 Wigmore, Evidence, Sections 410 and 416. In United States v. Pugliese, 153 F.2d 497 (2nd Cir. 1945), proof of the illegal manufacture of alcohol by the defendant in his house was admissible to identify him as the owner of alcohol later

found in the house. The only requirement to render such evidence admissible is that identity must be an issue. United States v. James, 208 F.2d 124 (2nd Cir. 1953).

When dealing with the admissibility of other criminal acts the courts must be guided by the principal that these acts, because of their highly prejudicial nature, are not admissible if offered only to show "a mere propensity or disposition on the part of the defendant to commit the crime." United States v. Stirone, 262 F.2d 571, 576 (3rd Cir. 1959). In the case at bar, however, Mr. Robinson's testimony was not offered for these purposes. It was offered to prove identity and to show an identical course of criminal action and as such should surely be admissible. Whether the identical criminal act took place prior to or after the offenses charged in the indictment should have no bearing on the admissibility of the evidence so long as it was logically connected with the offense charged and closely mixed-up in point of time with the history of the guilty acts themselves. United States v. Crowe, supra.

C. THE QUESTION OF THE CONSTITUTIONALITY OF 18 U.S.C. SECTION 2113(e) IN NO WAY AFFECTS APPELLANT.

Appellant contends that Title 18, United States Code, Section 2113(e) is unconstitutional in that it impairs his right to trial by jury because by electing to proceed to trial by jury he places his life in jeopardy because only the jury has the power under the

statute to impose the death penalty. This argument was accepted by the United States District Court in New Haven, Connecticut, in a case involving Title 18, United States Code, Section 1201 which contains the identical provision as found in Section 2113(e). Jackson v. United States, 262 F. Supp. 716 (1967). However, it is important to note that Chief Judge Timber's ruling was made on a pre-trial motion before Jackson was forced to decide whether or not to proceed to jury trial. In the case at bar appellant made no pre-trial or trial motions that the statute under which he was indicted and tried was unconstitutional. Appellant elected to proceed to trial by jury. He was convicted by the jury but the judgment indicated guilt without capital punishment [C. T. 109]. Thus, it is evident that appellant's right to trial by jury was in no way impaired. He reaped no harsher consequences from the jury verdict than from the judgment of the Court. Since appellant's argument goes to the possible sentencing power of the jury under the (e) provision of the statute and since the jury did not see fit to exercise their statutory power appellant should not be allowed to raise the constitutionality of the (e) provision which had no effect on his sentence or trial in any way. The (e) provision authorizing the death penalty should not taint the remaining provisions of Title 18, United States Code, Section 2113. As the Supreme Court stated in Champlin Rfg. Co. v. Commission, 286 U. S. 210, 234 (1931):

" . . . The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of

its remaining provisions - unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

There is no basis for doubting that Congress resolutely intended to make the robbery of a national bank a federal crime; the infirmity, if any, in the capital penalty clause does not require the total frustration of that purpose.

Should the Court still wish to proceed to consider the constitutionality of the statute the Government's position is discussed below.

A defendant indicted under the provisions of Title 18, United States Code, Section 2113(e) does not, by attempting to plead guilty or waiving trial by jury, avert the possibility of capital punishment; and, conversely, by electing trial by jury, he does not materially enhance the risk that he will be so punished. The trial judge is not required to approve a waiver of jury trial or accept a plea of guilty.

Gooch v. United States, 82 F.2d 534, 535

(10th Cir. 1936), cert. denied 298 U.S. 658;

Federal Rules of Criminal Procedure, Rule 23(a).

Furthermore, the Government has the right to compel trial by jury.

Singer v. United States, 380 U.S. 24 (1964). And even if the trial judge does approve of jury trial with respect to the issue of guilt

or innocence, or accepts a plea of guilty, he remains free to commence a jury for purposes of recommending appropriate punishment. Seadlund v. United States, 97 F.2d 742, 748 (7th Cir. 1938). See also, United States v. Dalhover, 96 F.2d 355 (7th Cir. 1938).

The trial judge in the Jackson case acknowledged the existence of the power, but disparaged it as discretionary and uncertain. We point out, however, that in the majority of the cases under the Kidnapping and Bank Robbery Acts in which capital punishment has been imposed, the trial judge refused to permit the defendant to avoid a jury recommendation on punishment by pleading guilty or waiving trial by jury. ^{3/}

Perhaps, a jury might recommend capital punishment in a case where the judge would have accepted a guilty plea -- but the

^{3/} According to the records of the Federal Bureau of Prisons, ten defendants have been (or are awaiting) execution under these provisions. Case reports and Department of Justice records disclose that five pleaded guilty; yet, the question of their punishment was still submitted to the jury. In two other cases, moreover, the plea was refused by the court, either directly or in effect.

To place the issue of this case in perspective, we further note that, according to the Administrative Office of the United States Courts, 563 individuals were convicted under the Kidnaping Act between 1951 and 1966. Of these, 389 pleaded guilty or no contest, 28 were convicted in a trial to the court, and 146 by juries. Four were sentenced to death--three after pleading guilty. Under the Bank Robbery Act, 4482 were convicted in this period, 3690 after pleading guilty or no contest, 86 after trial to the court, 706 after trial by jury. Two were sentenced to death, both after pleading not guilty. (Administrative Office statistics do not, however, differentiate between those who were convicted under the capital and under the non-capital provisions of the statute.) Between 1952 and 1966, according to these same sources, 144 individuals were convicted of rape in the District of Columbia. None was executed. Fifty-four pleaded guilty or no contest, 5 were convicted by the court and 85 by juries.

jury'd determination is not, in our view, binding on the court. It has been held that the concurrence of the trial judge in the jury's recommendation is required. Robinson v. United States, 264 F. Supp. 146, 151-153 (W.D. Ky). This reading conforms to the long tradition that makes the trial judge in the federal courts the arbiter of the sentence; to the mitigative purpose of the provision requiring jury authorization of the death penalty; and to the decisional trend which has sought -- at times in the face of statutory language apparently to the contrary -- to place the most humane construction on capital legislation.

In sum, whether a defendant indicted under the (e) provision of Section 2113 demands a trial by jury, on the one hand, or decides to waive trial by jury or plead guilty, on the other, there is a similar risk of capital punishment. Either way, the concurrence of both court and jury is necessary for its imposition. If the defendant elects to be tried by a jury, the death penalty will be imposed only if the jury so recommends and the judge agrees. If the defendant chooses not to have a jury trial, the judge must first determine whether he would concur in a jury recommendation of capital punishment; if he decides he would, he will convene a jury for punishment and if the jury recommends capital punishment will presumably concur. We see no essential difference in the procedures.

CONCLUSION

For the reasons stated above the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman
ANTHONY MICHAEL GLASSMAN

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PAUL SULGER,

Appellant,

vs.

B. H. POCHYLA,

JANE DOE POCHYLA, his wife,

THOMAS A. RYAN, and

JANE DOE RYAN, his wife,

Appellees.

No. 21,874 ✓

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEES

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FILED

SEP 25 1967

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SEP 27 1967

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**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PAUL SULGER,

Appellant,

vs.

B. H. POCHYLA,
JANE DOE POCHYLA, his wife,
THOMAS A. RYAN, and
JANE DOE RYAN, his wife,

Appellees.

No. 21,874

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEES

I.

JURISDICTIONAL STATEMENT OF FACTS

On May 17, 1966 a Notice of Filing of Petition for Removal from State Court to Federal Court, supported by Petition for Removal with attached copies of Summons and Complaint filed in the Superior Court of the State of Arizona, in and for the County of Cochise was filed by the United States Attorney of the District of Arizona on behalf of B. H. Pochyla and Thomas A. Ryan (Record on Appeal, item 95 docket en-

tries, 4 and 5. Hereinafter the Record on Appeal will be referred to as "RC", the number following will refer to the page; the parties will be referred to as appellant and appellees)

The petition for removal was verified by appellant B. H. Pochyla and Assistant U. S. Attorney Diamos and stated the three claims for relief in the Complaint were based upon appellees B. H. Pochyla and Thomas A. Ryan as officers of the United States Army having caused affidavits to be filed before the Arizona Corporation Commission to have appellant's public license for public limousine and taxi cab revoked; that at all times mentioned in the Complaint they were duly commissioned officers of the United States and were acting under color of their offices as Commander and Staff Judge Advocate of Fort Huachuca and in the performance of their duties brought said action to revoke appellant's said license (RC 5).

The Notice of the Petition for Removal and the Petition for Removal was sent to the Clerk of the Superior Court of the State of Arizona and for the County of Cochise and to Appellant (RC 4).

The Complaint alleged in the First Claim for Relief that appellees had conspired to coerce, defraud and defame appellant by means of false and fraudulent statements and thereby to injure appellant in his business. The Second Claim for Relief realleged all the allegations of the First Claim by reference and then alleged appellant had not authorized the statements to be published and alleges an invasion of his right to privacy; the Third Claim for Relief realleges all the allegations of the First Claim for Relief by reference and alleges these statements exposed appellant to public ridicule, and that these were false and damaged appellant's reputation; and that these statements were made maliciously, deliberately and with wilful intent to injure plaintiff (RC 10-17).

On May 20, 1966, appellees filed their answer which denied all the allegations except they admitted appellant was a common carrier and they admitted the quoted statement in

Paragraph Six was made in a pleading to the Arizona Corporation Commission and alleged the affirmative defense that appellees B. H. Pochyla and Thomas A. Ryan were acting in the discharge of their official duties (RC 18).

On May 23, 1966 appellant filed a Motion to Remand on the grounds the United States District Court was devoid of jurisdiction as set out in the Memorandum of Points and Authorities which set out that 28 U.S.C.A. 1442a does not cover slanderous statements and further that 28 U.S.C.A. 1442a does not cover the wives of the appellees (RC 22).

On June 7, 1966, appellees filed a Memorandum in Opposition supported by the separate Affidavits of each of the appellees (RC 28).

On June 13, 1966 the Court heard the Motion to Remand and it was denied (RC 96).

On July 8, 1966 appellees filed a Motion for Summary Judgment supported by the affidavits of Colonel Robert P. Johnson and Major General L. G. Cagwin and incorporated by reference the four Affidavits of appellees filed with the Memorandum in Opposition to the Motion to Remand (RC 47).

On August 4, 1966 appellant filed a Response to Defendants' Motion for Summary Judgment (RC 59).

On August 8, 1966 the Court heard argument on the Motion for Summary Judgment and took the matter under advisement (RC 96).

On August 10, 1966 the Clerk entered the Court's written memorandum of its ruling that the Motion for Summary Judgment was denied (RC 96).

On October 3, 1966 the depositions of Rex Thornton and William Stone were filed (RC 67 and 68).

On December 13, 1966 appellant's present counsel entered an appearance (RC 96).

On January 16, 1967 appellees filed a second Motion for Summary Judgment (RC 76).

On January 17, 1967 the Court entered an Order Nunc

Pro Tunc granting the first Motion for Summary Judgment as of August 10, 1966 and directing the Clerk to enter judgment for appellees (RC 96 and 97).

On January 17, 1967 the Clerk entered Judgment for appellees (RC 82).

On March 16, 1967 appellant filed Notice of Appeal (RC 84).

This Court has jurisdiction pursuant to the provisions of 28 U.S.C.A. §1291.

II.

STATEMENT OF FACTS

(Since the Complaint and Answer of the case herein are not verified they do not constitute facts of the case for the reason that an adverse party to a Motion for Summary Judgment "may not rest upon the mere allegations or denials of his pleading." Rule 56 (e) Federal Rules of Civil Procedure, Title 28, U.S.C.A.)

Appellee B. H. Pochyla was a Major General of the United States Army from September 1, 1963 through June 1966 and was Commanding General, United States Army Electronic Proving Ground, Fort Huachuca, Arizona (RC 32 and 53).

Appellee Thomas A. Ryan was a Colonel of the Judge Advocate General's Corps, United States Army, and was Staff Judge Advocate of the United States Army Electronic Proving Ground, Fort Huachuca, Arizona, from June 11, 1962 through June, 1966 (RC 37 and 57).

Reports were made to General Pochyla, appellee, and after an investigation and conferences with appellant, sworn affidavits were obtained of Army personnel who travelled in the appellant's limousine on Government travel requisitions to or from the Tucson International Airport (RC 32-33 and 37-38). The affidavits were forwarded to the Arizona Cor-

poration Commission by Colonel Ryan, appellee, at the direction of General Pochyla, appellee (RC 33 and 38). An Order to Show Cause was issued by the Arizona Corporation Commission for a hearing on February 11, 1965 (RC 38 and 33). General Pochyla, appellee, was subpoenaed at appellant's request, and General Pochyla, appellee, asked Colonel Ryan, appellee, to accompany him to the hearing as Staff Judge Advocate (RC 38 and 33).

The Arizona Corporation Commission took the matter under advisement on February 11, 1965, after the hearing (RC 34 and 38).

A soldier, going to Colonel Ryan, appellee, for advice after the appellant had filed criminal charges on him, brought about an investigation and further affidavits were obtained, and on April 8, 1965, a petition to reopen the hearing was filed by Colonel Ryan, appellee, at appellee General Pochyla's direction (RC 38-39 and 34-35).

Because a direct interest of Department of the Army was involved, the Litigation Division, Communications, Transportation and Utilities Branch, Office of The Judge Advocate General, as represented by Mr. John Faulk, Attorney, filed a Petition for Leave to Intervene on Behalf of the Department of the Army and the Leave to Intervene was subsequently granted by the Arizona Corporation Commission (RC 41 and 35).

A hearing was held on June 7, 8 and 30, 1965, by the Arizona Corporation Commission at Sierra Vista, Arizona (RC 35 and 38-42).

On August 30, 1965, the Arizona Corporation Commission rendering its Opinion and Order No. 37988, cancelling appellant's Certificate No. 7694—Docket NC 17463 cancelled (RC 41-42).

Appellant filed an appeal in State Court and the Superior Court did not set aside the cancellation order (RC 42-43).

Appellee B. H. Pochyla stated:

"Any and all statements that I have ever made concerning Mr. Sulger, his cab drivers and his business were made by me in my official capacity as an officer of the United States Army acting under color and authority of my office as Commanding General, Fort Huachuca, Arizona." (RC 35).

Appellee Thomas A. Ryan stated:

"Any and all statements that I have ever made concerning Mr. Sulger, his cab drivers and his business were made during the investigation, preparation, hearings and trial of the matters related herein, and in my official capacity as Staff Judge Advocate, Fort Huachuca, Arizona and as an officer of the United States Army acting under color and authority of such office and pursuant to directions of my commanding officer, Major General B. H. Pochyla, Commanding General, Fort Huachuca, Arizona." RC 44).

Both appellee Constance Pochyla and appellee Katherine Ryan stated:

"That I have never been involved in any matters relating to Mr. Sulger and have no knowledge concerning the facts involved or alleged by Mr. Sulger." (RC 45 and 46).

Appellant, some 25 days after receipt of the Motion for Summary Judgment, after having obtained an extension of time, filed the Affidavits of William Stone (RC 62), Rex Thornton (RC 63) and Frank Lewis (RC 64-65). There was no affidavit by appellant.

The latter affidavit alleged that Frank Lewis had not had sufficient time to take depositions and develop information concerning the extent of the immunity covering the appellees (RC 64-65).

William Stone in the affidavit filed by appellant alleged:

"That sometime during the latter part of May, 1965, your affiant was engaged in a conversation with Colonel Thomas A. Ryan at Sierra Vista, Arizona; that during

the foregoing mentioned conversation Colonel Thomas A. Ryan stated that 'we' are going to put Paul Sulger out of business because Mr. Sulger and his wife were not morally fit to conduct business; that your affiant asked Colonel Thomas A. Ryan who he meant by 'we' and Colonel Thomas A. Ryan informed your affiant that he meant General Benjamin H. Pochyla and himself; that Colonel Thomas A. Ryan said to your affiant that Paul Sulger was soliciting for prostitutes and that Paul Sulger was a 'Pimp' and that your affiant was told by Colonel Thomas A. Ryan that the reason they were after Paul Sulger was because Mr. Sulger had written to several Arizona Congressmen and President Johnson concerning the unfair competition by Fort Huachuca transportation facilities." (RC 62). Rex Thornton in the affidavit filed by appellant, alleged:

"That sometime during May, 1965, Colonel Thomas A. Ryan telephoned your affiant concerning the sale of an automobile to a soldier based at Fort Huachuca, Arizona; that during said conversation, Colonel Thomas A. Ryan stated to your affiant that Paul Sulger and his wife were morally unfit and that 'they' were going to put Paul Sulger out of business and that Colonel Thomas A. Ryan told your affiant during said conversation that in a few days 'they' had a big surprise in store for Paul Sulger." (RC 63).

The depositions of William Stone and Rex Thornton were taken by appellees, after notice, on September 9, 1966.

In the deposition of Stone, he stated on page 8 line 22 through page 9 line 24 as follows:

"Q What did you tell Colonel Ryan when he asked you if you'd be a witness at the hearing?

A I told him, 'Anyone subpoenas me, I'll be a witness.' If I was subpoenaed, I'd be a witness.

Q What did he say to that?

A Well, then the conversation went into the—I asked him why, all this and that, what he would need me for, and he said, 'Routine questions.'

Appellee B. H. Pochyla stated:

"Any and all statements that I have ever made concerning Mr. Sulger, his cab drivers and his business were made by me in my official capacity as an officer of the United States Army acting under color and authority of my office as Commanding General, Fort Huachuca, Arizona." (RC 35).

Appellee Thomas A. Ryan stated:

"Any and all statements that I have ever made concerning Mr. Sulger, his cab drivers and his business were made during the investigation, preparation, hearings and trial of the matters related herein, and in my official capacity as Staff Judge Advocate, Fort Huachuca, Arizona and as an officer of the United States Army acting under color and authority of such office and pursuant to directions of my commanding officer, Major General B. H. Pochyla, Commanding General, Fort Huachuca, Arizona." (RC 44).

Both appellee Constance Pochyla and appellee Katherine Ryan stated:

"That I have never been involved in any matters relating to Mr. Sulger and have no knowledge concerning the facts involved or alleged by Mr. Sulger." (RC 45 and 46).

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A I told him, 'Anyone subpoenas me, I'll be a witness.' If I was subpoenaed, I'd be a witness.

Q What did he say to that?

A Well, then the conversation went into the—I asked him why, all this and that, what he would need me for, and he said, 'Routine questions.'

Q Well, did the conversation develop any further than that after he told you he was going to ask you routine questions?

A Yes, sir. Then, when I asked him what all the trouble was about—I couldn't understand what all the trouble was about, because he had better equipment than I had when I was the owner of the cab business. Then the Colonel said, 'There wouldn't have been no trouble if he hadn't written all the letters to the Congressmen and the President of the United States, and brought pressure on the General and myself,' and he said, 'We have to take action.' And I asked who he meant by 'we.' He said Mr. Pochyla and himself, because of the pressures that was brought on them. He said, 'You are aware that he is pimping for the girls in Nacco,' and I said, 'No, I was unaware of this.' He said, 'Mr. and Mrs. Sulger are morally unfit to run a business, and we don't need people like that in this area.' " (RC 68).

Thornton in his deposition was read his affidavit by Government's counsel on page 8 lines 14 through 22 and Thornton replied "that's right." Thornton stated he did not believe the statements at page 19 lines 19-20 (RC 67).

III.

OPPOSITION TO SPECIFICATION OF ERRORS

1. There was no issue of any material fact that as to appellees Jane Doe Pochyla, Jane Doe Ryan, B. H. Pochyla and Thomas A. Ryan so that the Court did not err in granting summary judgment for appellees.

2. The District Court had acquired jurisdiction over the cause by the Removal Petition of Appellees, even though a bond was not filed.

IV.

SUMMARY OF ARGUMENT

1. The District Court acquired jurisdiction of the case by the Removal Petition although no bond was filed since appellant did not raise it in the Court below.

2. The minute entry made by the Clerk on August 10, 1966 denying the Motion for Summary Judgment was a "clerical error."

3. The privilege against suit of federal officers while acting in the discharge of their duties is absolute, and the Motion for Summary Judgment was properly granted, there being no issue of any material fact.

V.

ARGUMENT

1. The District Court acquired jurisdiction of the case by the Removal Petition although no bond was filed since the appellant did not raise it in the Court below.

In Appellant's Motion to Remand and Memorandum of Points and Authorities, (RC 22) appellant makes no mention of the absence of the bond required in a removal of a case from state court to federal court as required by 28 U.S.C.A. 1446(d) in cases in which the petition is not made in behalf of the Government.

In *Nelson v. Peter Kiewit Sons Co.* (DC N.Y. 1955) 130 F.Supp. 59) the United States Attorney had filed the Petition for Removal but made no mention that the Petition for Removal was made at the direction of a department or agency of the United States, but since "the removal statute does not require any such proof to appear in the petition, it

may be made later than the removal, if made with reasonable expedition." *Nelson v. Peter Kiewit Sons Co.*, *supra* at page 65.

In the cases cited by appellant on pages 22 and 23 of his Opening Brief as well as in the Nelson case, the lack of bond was raised by the opposing party in a Motion to Remand or a Motion to Dismiss the Removal Petition. Appellant did not raise this in the Court below.

In *Ayers v. Watson* (1885) 113 U.S. 594 at page 598, 5 S.Ct. 641, 28 L.Ed 1093, in a discussion of the bonding requirements, then Sec. 3 of the Code, the Court stated:

"By § **B** it is provided that a petition must be filed in the State court before or at the term at which the cause can be first tried, and before the trial thereof, for the removal of the suit into the Circuit Court, and with such petition a bond, with condition, as prescribed in the act. The second section defines the cases in which a removal may be made; the third prescribes the mode of obtaining it, and the time within which it should be applied for. In the nature of things, the second section is jurisdictional, and the third is but modal and formal. The conditions of the second section are indispensable, and must be shown by the record; the directions of the third, though obligatory, may to a certain extent be waived. Diverse State citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. *Mansfield & Coldwater Railway Co. v. Swan*, 111 U.S. 379. Application in due time, and the proffer of a proper bond, as required in the third section, are also essential *if insisted on*, but, according to the ordinary principles which govern such cases, may be waived, either expressly or by implication." (emphasis supplied).

In *Martin v. Baltimore & Ohio Railroad* (1894) 151 U.S. 673 at pages 688-689, 14 S.Ct. 533 at 538, 38 L.Ed 311, the Court stated:

"In *French v. Hay*, 22 Wall. 238, the case had been removed under the act of March 2, 1867, c. 196, (14 Stat. 558,) reenacted in Rev. Stat. § 639, cl. 3, which required the petition to be filed 'before the final hearing or trial' in the state court; the Circuit Court of the United States denied a motion to remand, made, as the report states, because the act 'had not been complied with in respect to time and several other important particulars;' and this court, on appeal, approved its action, and, speaking by Mr. Justice Swayne, said: 'The objection made in the court below touching the removal of the case from the state court, and which objection has been renewed here, was not made in the court below until the testimony was all taken, the case was ready for hearing, and nearly three years had elapsed since the transfer was made. The objection came too late. Under the circumstances it must be held to have been conclusively waived.' And *Taylor v. Longworth*, above cited, was referred to as in point. 22 Wall. 244, 245."

(Cited in *Journal Pub. Co v. General Gas Co.* (9th Cir. 1954) 210 F. 2d 202 at page 204 to the effect that a case not removable when commenced may afterwards become removable.)

It is respectfully submitted the appellant has waived his objection by not raising it in the Court below, and further if the objection had been made then the Government's counsel would then have had the opportunity to place in the record that the Removal Petition was filed at the direction of the Department of Justice acting at the request of the Department of the Army.

2. The minute entry made by the Clerk on August 10, 1966 denying the Motion for Summary Judgment was a "clerical error."

Rule 60(a) Federal Rules of Civil Procedure, Title 28, U.S.C.A. provides in part:

"(a) *Clerical Mistakes*—Clerical mistakes in judgments, orders or other parts of the record and errors

therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

Government's counsel after taking the deposition of Stone and Thornton filed a second Motion for Summary Judgment on January 16, 1967 (RC 76) and lodged a chamber's copy with the Court. The United States District Judge, James A. Walsh, apparently then checked the Docket and found that his written direction to the Clerk to enter an Order granting the Motion for Summary Judgment had been entered as an Order denying it and so on January 17, 1967 entered an Order as follows:

"It appearing from the file and record in this cause that the court directed the clerk, in writing, on August 10, 1966, to enter an order in this cause that defendants' Motion for Summary Judgment is *granted*, and it appearing further that the clerk erroneously entered an order that defendants' Motion was *denied* and so notified counsel in the case, it is ordered that the clerk forthwith enter, *nunc pro tunc*, as of August 10, 1966, an order that the defendants' Motion for Summary Judgment is granted; and that the clerk forthwith enter judgment in this cause that plaintiff take nothing by his complaint, that the same be dismissed, and that defendants have their costs of suit." (RC 96-97).

The Clerk then entered Judgment for appellees. (RC 82) Clearly this was a clerical error.

3. The privilege against suit of federal officers while acting in the discharge of their official duties is absolute, and the Motion for Summary Judgment was properly granted, there being no issue of any material fact.

Appellant notes on pages 2-3 of his opening brief that he had filed the Notice of Appeal within the time required

by Rule 73(a) Fed. Rules of Civil Procedure, Title 28 U.S.C.A., in the case of an "officer or agency." If as appellant contends there were slanderous statements outside the scope of privilege, i.e., these statements were not made in the discharge of their duties, then why would appellant take the full sixty days to file the Notice of Appeal.

Appellant makes no argument, with respect to appellees Jane Doe Pochyla and Jane Doe Ryan nor was there any controverting of their affidavits that they knew nothing concerning appellant's affairs.

Appellant argues that appellee B. H. Pochyla's statement is a conclusion of law when he stated any statements made concerning appellant were made while discharging his duties constituted a conclusion of law and therefore no denial was made of the general allegations of the complaint. However, no affidavit was filed concerning General Pochyla having made any statements; only his affidavit cites the acts he directed to be done and he does not recite any statements that he made.

Appellant cannot rely on the allegations of his complaint, which was not verified, to create an issue of fact. Rule 5(e) Federal Rules of Civil Procedure, 28 U.S.C.A. See *Norton v. McShane* (5th Cir. 1964) 332 F. 2d 855 at page 861, where an affidavit of the Attorney General was quoted that at all times set forth in the complaint the defendants were acting in the discharge of their duties. Compare this to the affidavits of Major General L. G. Cagwin (RC 53) and Colonel Robert P. Johnson (RC 57) setting forth the duties of the Commander and Staff Judge Advocate of Fort Huachuca.

(Although the depositions of Thornton and Stone were taken after entry of the nunc pro tunc order and there was no motion for rehearing by appellant based on these depositions, they will be argued herein, despite the appellees' position they are not part of the record.)

The statements as alleged by Stone and Thornton were

only admitted as being uncontroverted for the purpose of the Motion only. (RC 80 lines 3-4)

It can be seen by the affidavits of appellees B. H. Pochyla and Thomas A. Ryan that they are asserting a privilege for acts done under the color of their office. The alleged statement to William Stone by Colonel Ryan was made during investigation by Colonel Ryan for the hearing before the Arizona Corporation Commission. The alleged statements to Rex Thornton and William Stone are shown for the purpose of showing malice on the part of appellee Ryan since neither statement is believed. In *Kelser v. Hartman*, (3rd Cir., 1964) 339 F.2d 597, cert. den. 381 U.S. 934, 85 S. Ct. 1764 14 L.Ed. 2d 969, the tort action was brought for alleged libel and slander and malicious conspiracy to secure his discharge. The Third Circuit, affirming the District Court held the act of defendant were absolutely privileged, even though they were within the outer perimeter of their line of duty as Federal employees. The plaintiff had contended such malice as he alleged destroyed any privilege against suit. The Third Circuit held *Barr v. Matteo* (1959), 360 U.S. 564 79 S.Ct. 1335, 3 L.Ed.2d 1434, controlling and held the suit barred by absolute privilege. In *Camero v. Kostos* (USDC, N.J., 1966), 253 F.Supp. 331, it was stated at page 336:

"Accepting the mandate in *Keiser*, and applying the standards in *Barr* for sustaining absolute privilege, it cannot fairly be concluded that the defendant did in fact exceed the 'outer perimeter of his line of duty' by his conduct in the performance of such duties with which he was charged by his supervisor and Agency. As pointed out by the Court of Claims, in *Camero v. Kostos*, supra, where the matter is still pending on an interlocutory remand, it may well be developed that defendant's conduct in regard to his written recommendation to the Depot Commander violated Army Grievance Regulations procedurally, and that such violation, if any, may invalidate the dismissal of defendant from employment. But that

is not the issue presented to this Court on this motion to dismiss, for that alone would be insufficient to dissipate the absolute privilege of immunity from tort suit here. For even then, this would be within the outer perimeter of defendant's line of duty as a zealous prosecutor committed to the establishment of the charge. It is the function of such an advocate to persuade the ultimate adjudicatory department or forum of the justice of his cause. That he may have been motivated by malice, or that he did not find his duty distasteful, or that through over-zealousness he may have exceeded the internal regulations of the Army's Grievance proceedings, nevertheless, such would not destroy the immunity traditionally afforded. Such is deemed to be the law as established by *Barr*. Cf. *Norton v. McShane*, 332 F.2d 855 (5 Cir. 1964), where an intentional tort complaint for assault by United States Marshal was dismissed."

In *Barr v. Matteo*, *supra*, at pages 571 through 573, the Supreme Court quotes with approval Judge Learned Hand in *Gregoire v. Biddle*, 177 F. 2d 579, at page 571:

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand:

'It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is

that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .

'The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . .' *Gregoire v. Biddle*, 177 F. 2d 579, 581.

We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of

cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy."

It is respectfully submitted that in balancing the two interests, i.e., the free exercise of a Federal officer of his duties without fear of damage suits and the redress of damage to a private citizen, that it is better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

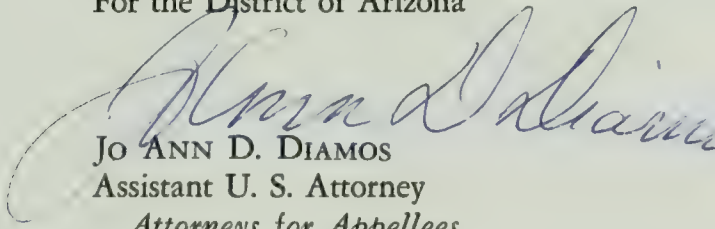
VI.

CONCLUSION

It is respectfully submitted that the District Court had jurisdiction of the cause and properly granted the Motion for Summary Judgment of appellees, there being no material issue of fact.

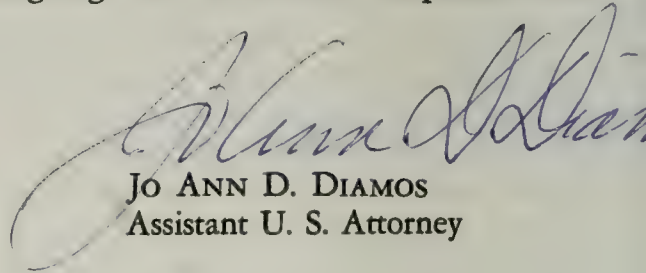
Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.



JO ANN D. DIAMOS
Assistant U. S. Attorney

Three copies mailed this 21 day of September,
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENJAMIN R. LAWSON,
Appellant,
vs.

CALIFORNIA ADULT AUTHORITY,
AGENTS, and WALTER DUNBAR,
Director of the Department
of Corrections, et al.,

Appellees.

APPELLEES' BRIEF

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SEP 5 1967

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Attorneys for Appellees

SEP 1977

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No. 21877

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENJAMIN R. LAWSON,)
)
 Appellant,)
)
 vs.)
)
CALIFORNIA ADULT AUTHORITY,)
AGENTS, and WALTER DUNBAR,)
Director of the Department)
of Corrections, et al.,)
)
 Appellees.)

APPELLEES' BRIEF

JURISDICTION

The order of the United States District Court for the Northern District of California dismissing plaintiff's complaint, in the proceeding entitled "Lawson v. California Adult Authority, et al.," No. 45898, was issued March 17, 1967. Appellant's notice of appeal and affidavit to proceed without prepayment of costs was received by the District Court on April 6th and his request was granted on April 19, 1967. Appellant seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. section 1219 and 28 U.S.C. section 1298, he undoubtedly means Title 28 U.S.C. sections 1915, 1291.

STATEMENT OF THE CASE

Appellant invoked the jurisdiction of the District

Court pursuant to 42 U.S.C. section 1989 and 42 U.S.C. section 1983 (Civil Rights Act of 1964) and prayed that court to issue warrants for the arrest of the named defendants.

Appellant alleged that he had completed his term of imprisonment and was being unlawfully restrained in the state prison at San Quentin, California.

Appellee filed a motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure upon the ground that the complaint failed to state a cause of action upon which relief could be granted and pursuant to 28 U.S.C. section 1915(d) in that the complaint was frivolous and malicious. Appellant filed points and authorities in opposition to our motion which was heard by the Honorable Albert C. Wollenberg on March 13, 1967.

The District Court granted appellees' motion to dismiss appellant's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and Title 28 U.S.C. section 1915(d) on March 17, 1967.

STATEMENT OF FACTS

Appellant's complaint alleged that the members of the California Adult Authority had conspired to deprive him of the processes of court, due process, equal protection, had kidnapped and imprisoned him in excess of the lawful maximum time prescribed by law.

See Report of Adult Authority, Exhibit "J."

SUMMARY OF APPELLEES' ARGUMENT

1. Appellant's complaint was properly dismissed by the District Court.

(a) Pursuant to Rule 12(b)(6)

(b) Pursuant to 28 U.S.C. section 1915(d).

ARGUMENT

I.

APPELLANT'S COMPLAINT WAS PROPERLY
DISMISSED BY THE DISTRICT COURT
PURSUANT TO RULE 12(b)(6).

Rule 12(b)(6) provides in pertinent part that the defendant may move to dismiss the plaintiff's complaint when such complaint fails to state a claim upon which relief can be granted. It is clear from the face of appellant's complaint that the District Court was without power to grant the relief which appellant sought.

Appellant based his complaint upon 42 U.S.C. section 1989 and "the Civil Rights Act of 1964" (42 U.S.C.A. 1983). His complaint was entitled "Petition for Writ of Quo Warranto" and sought to have the District Court issue warrants for the arrest of the named defendants. It is axiomatic that the District Court does not have the authority under the Civil Rights Act (42 U.S.C.A. § 1983) to issue warrants of arrest for named defendants. 42 U.S.C. section 1989 is manifestly inapplicable.

In addition, appellant did not allege facts which, even remotely, could give rise to a federal cause of action: kidnapping, as appellant points out, is a violation of California Penal Code section 207. The Civil Rights Act does not create a cause of action for kidnapping unless it be in pursuance of a systematic policy of discrimination against a class or group of citizens. See Radford v. Lefkowitz, 240 F.Supp. 969, 977 (S.D.N.Y. 1965); accord Truitt v. Illinois, 278 F.2d 819, 820 (7th Cir. 1960), cert. denied, 364 U.S. 866.

II.

APPELLANT'S COMPLAINT WAS PROPERLY
DISMISSED BY THE DISTRICT COURT
PURSUANT TO 28 U.S.C. 1915(d).

Title 28, United States Code, section 1915, provides in pertinent part that the District Court in proceedings in forma pauperis may dismiss the case if satisfied that the action is frivolous or malicious. Appellees submit that a reading of appellant's complaint and an examination of the exhibits filed with the District Court demonstrate that appellant's action is not only malicious but indeed no factual basis for the instant complaint exists.

The setting by the Adult Authority of appellant's term at 12 years was of course tentative and subject to change for cause. See In re McLain, 55 Cal.2d 78, 89 (1960). The effect of the suspension of September 23, 1965, was to refix appellant's term at the maximum, i.e.,

life. See In re Costello, 262 F.2d 214, 215 (9th Cir. 1959). Appellant was at all times subject to the jurisdiction of the California Adult Authority which revoked his parole for cause. Thus, he is presently properly imprisoned in the state prison at San Quentin, California.

Refusal of the District Court to allow state prisoners to proceed under the Civil Rights Act in forma pauperis is a matter within that Court's discretion. See Shobe v. California, 362 F.2d 545 (9th Cir. 1966); Weller v. Dickson, 314 F.2d 598 (9th Cir. 1963) and the dismissal of appellant's complaint cannot be reversed without showing that the district court abused its discretion. Caviness v. Somers, 235 F.2d 455 (4th Cir. 1956).

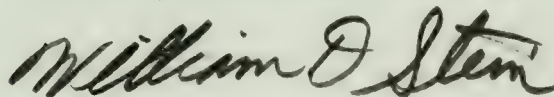
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court dismissing appellant's complaint should be affirmed.

DATED: August 28, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General



WILLIAM D. STEIN
Deputy Attorney General

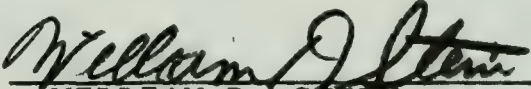
Attorneys for Appellees

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24CRSF
67-89

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: August 28, 1967



WILLIAM D. STEIN
Deputy Attorney General

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21878 ✓

BRUCE EUGENE BOSWELL,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

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FILED

SEP 18 1967

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21878

BRUCE EUGENE BOSWELL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the Southern District of California.

The appellant was sentenced to the custody of the Attorney General for a period of three years for one count of violation of Section 50 U.S.C. App. 462; Universal Military

Training and Service Act; Refusal to be inducted [CT 28].¹ Title 18, Section 3231, United States Code, conferred jurisdiction in the District Court over the prosecution of this case. This court has jurisdiction of this appeal under Rule 37 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law [CT 29].

STATEMENT OF THE CASE

The indictment charged the appellant with a violation of the Universal Military Training and Service Act for refusing to submit to induction.

Appellant pleaded not guilty and was tried by Judge Jesse W. Curtis, sitting alone, without a jury. Appellant was found guilty and sentenced, as shown in the Clerk's Transcript of Record on file herein.

A written motion for Judgment of Acquittal had been filed during the trial [CT 23].

THE FACTS

Appellant registered with Local Board No. 134, Santa Ana, California and was given number 4-134-43-704.

He was classified in Class I-A, meaning available for military service.

He was ordered to report for induction. Before the date set for his induction he went to the office of the local board and asked the clerk for the Special Form for Conscientious Objector (SSS Form No. 150). She refused to give it to him.

Appellant then wrote a brief letter to the local board stating he would not submit to induction and, subsequently, on March 16, 1966, refused to submit to induction [Ex. 66].

1. CT refers to the Transcript of Record.

QUESTIONS PRESENTED AND HOW RAISED

I

Was appellant denied due process by the refusal of the board employee to give him the opportunity to formally submit a claim for a conscientious objector classification? This was raised by the Motion for Judgment of Acquittal.

II

Was appellant denied a classification without a basis in fact? This also was raised by the Motion.

SPECIFICATION OF ERRORS

I

The district court erred in failing to grant the motion for judgment of acquittal.

II

The district court erred in convicting the defendant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

1. Appellant was entitled to have the Special Form and to file it.
2. He was entitled to claim a conscientious objector classification.
3. The filing of a prima facie claim for a classification "lower" than one currently held requires a reopening.
4. He was prejudiced by the arbitrary action of the clerk.

Dickinson v. United States, 74 S. Ct. 152 (1953).

Brown v. United States, 9 Cir., 1954, 216 F. 2d 258.

Gearey v. United States, 2 Cir., 1966, 368 F. 2d 144.

later submitted. . . . Classification by the local board is an indispensable step in the process of induction. The registrant is entitled to have his claims considered and acted upon by these local bodies. . . .

“But, it is suggested, a presumption of regularity or due performance of duty attends official action; and it should be presumed in this instance not only that the local board considered the claims of the registrant but that in light of them it took action to continue in effect his original I-A classification. We think the court may not indulge the presumption, at least in the latter respect, in the condition of the record in the case.”

Thus the local board did not make the essential finding that Boswell's beliefs had matured at some time other than the period between the Notice to Report for Induction and the induction date. Absent such a finding, *Gearey* holds that he would be “entitled” to reopening (368 F.2d 144, 150). We submit that the *Gearey* decision is sound and should be followed.

If *Gearey* is not applied to the set of facts present here the courts will be creating an anomalous situation. A man whose conscientious objections crystallize (1) before the Order to Report for Induction or (2) after induction actually takes place, may, as Congress intended, serve his country in other than a military capacity. The Selective Service System aids him in the first instance. In the second instance the various military services have provided procedures for investigating claims of conscientious objection arising after induction and, in appropriate cases, granting honorable discharge. See: Department of Defense Directive No. 1300.6 ASD(M) (August 21, 1962); Army Regulation No. 635-20 (5 January, 1966); Department of Navy, Bupers Instruction 1616.6 (November 15, 1962); Marine Corps Order 1306.16A (October 16, 1962); Air Force Regulation No. 35-24 (March 8, 1963). Each of these pro-

vides that the belief must not have existed prior to induction on the grounds that, had it been, it would have been properly investigated by the Selective Service System.

The gap that would be created by rejection of the holding in *Gearey* would fly in the face of the Congressional policy shown by the language of Section 6 (j) of the Universal Military Training and Service Act that “Nothing in this title . . . shall be construed to require *any* person be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . .” (Emphasis supplied).

As early as 1945, the courts have expressed disapproval of such a gap in the scheme of classification. In *U. S. ex rel. Hull v. Stalter*, (7th Cir., 1945) 151 F.2d 633, 635, the court said:

We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. In fact, the latter situation seems to be contemplated by § 5 (h) of the Act, which provides that “no * * * exemption or deferment * * * shall continue after the cause therefor ceases to exist”. The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be en-

deprived him of his right of personal appearance before the board and of his right to an administrative appeal, and hence of due process, in consequence of which the order for his induction is invalid."

II

There Was No Basis in Fact for Rejecting the Appellant's Conscientious Objection Classification Claims.

The appellant finally "crystallized" his conscientious objections on or about March 15, 1967, by the order to Report for Induction.

The board took no evidence from appellant subsequent to that time as it did not even interview him. There is no indication in the file that the board had any other evidence from any source, or tried to get any as to the sincerity of appellant's belief or the validity of his claims. See *Dickinson v. U. S.*, 74 S. Ct. 152, at 157, where the High Court partially cataloged the many means by which the boards could test the truthfulness of a registrant's claims, and page 158 where it denounced "dismissal of the claim solely on the basis of suspicion and speculation."

Information from prior to that date should be no more relied upon to dispute appellant's present sincerity than should the persecutions he participated in prior to the incident on the Damascus road be used to discredit St. Paul's standing as a Christian.

Thus, although the local board could easily have gathered evidence upon which to evaluate appellant's claim, they did not do so but instead arbitrarily rejected those claims without even so much as talking to him.

CONCLUSION

For the reasons above stated, the judgment of the district court should be reversed and an order entered directing the district court to render and enter a judgment of acquittal.

Respectfully submitted,

J. B. TIETZ and
MICHAEL HANNON
Attorneys for Appellant

September 15, 1967

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ and
MICHAEL HANNON
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NO. 21878

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRUCE EUGENE BOSWELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
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NO. 21878

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRUCE EUGENE BOSWELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, Bruce Eugene Boswell, was indicted on December 7, 1966 by the Federal Grand Jury for the Southern District of California, Central Division, in Case No. 36873-CD, and charged with violating Title 50 Appendix, United States Code, §462, Universal Military Training and Service Act, by refusing to be inducted [Clerk's Transcript P. 23; hereafter C. T. ____]. Appellant pleaded not guilty and was convicted after a court trial; he was sentenced to the custody of the Attorney General for a period of three years [C. T. 6, 28]. Appellant was represented by retained counsel at all stages of the proceeding.

Jurisdiction of the trial court was founded upon Title 50 Appendix, United States Code, §462, and Title 18, United States Code, §321. This Court has jurisdiction pursuant to Title 28, United States Code, §§1291, 1294.

II
STATUTES INVOLVED

Title 50 Appendix, United States Code, §462(a) provides in pertinent part as follows:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . , or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . , or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . , shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both. . . ."

Title 50 Appendix, United States Code, §456(j) provides in pertinent part as follows:

"(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code. "

Regulations:

Title 32, Code of Federal Regulations, Section 1625.2 provides as follows:

"§1625.2 When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information

presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control. "

Title 32, Code of Federal Regulations, Section 1641.2(b) provides in pertinent part:

"If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege. "

III

STATEMENT OF THE CASE

Appellant registered with Local Board No. 134 [hereafter Board], Santa Ana, California, on July 7, 1961. [Selective Service Transcript of Record, page 2; hereafter T.] On February 17, 1964, the Board received a completed classification questionnaire from appellant [T. 4-11]. Appellant did not assert conscientious objections to war by signing series VIII of this form [T. 7]. On April 2, 1964, appellant was classified as I-A (available for military service), and he was notified of this classification [T. 11]. Thereafter, appellant was found physically acceptable for military service [T. 14].

On August 31, 1964, appellant notified the Board that he was enrolled in Orange Coast College. A student certificate was received by the Board on October 13, 1964 [T. 19-20]. In filling out this form, appellant, in answer to the question whether there were any incidents in his life which might reflect upon his loyalty to the United States, or upon his suitability to perform military duties, stated:

"I will serve my country in a constructive manner which is helpful to it or mankind in general, however, I will not participate in an illegitimate and aggressive war such as that which we are waging and we are escalating in Viet Nam."

Appellant added:

"The United States of America is the agressor and the offender in Viet Nam, and I will have no part of this war." [T. 24].

Upon receiving the above student certificate, appellant was classified as II-S on October 14, 1965, and duly notified of this action [T. 11]. This deferment continued until January 10, 1966, when appellant was classified as I-A, following notice from Orange Coast College that he had withdrawn from his studies [T. 11, 26].

On February 11, 1966, he was ordered to report for induction on February 23, 1966 [T. 27]. The date for induction was postponed by notice sent on February 18, 1966, and the new date to report was set for March 16, 1966 [T. 29]. The day before the scheduled induction, appellant submitted this statement to his Board:

"I would like my position and beliefs made clear from the very beginning of my term in the Armed Services.

"I am willing and would be happy to serve my country in a constructive manner. However, I refuse to fight an illegitimate war or kill or take part in killing foreign people in foreign lands. "

Nothing in the file indicates that appellant requested a Form 150 (Special Form for Conscientious Objector), as claimed, or that he was refused such a form upon request. Appellant appeared on March 16, was allocated to the United States Marine Corps, but

refused to submit to induction [T. 30, 31, 44-47, 65, 66].

IV

QUESTIONS PRESENTED

- 1. Can appellee rely on the presumption that official duty was regularly performed?
- 2. On this record, would a refusal to furnish appellant a Form 150 on the day before his induction, void an order to report for induction previously issued?

V

SUMMARY OF ARGUMENT

- 1. The presumption that official duty was regularly performed should be applied.
- 2. Assuming the truth of appellant's testimony that he was refused a Special Form for Conscientious Objector, we submit that the previously issued order to report for induction should not be rendered void, since the record discloses: (a) that the conscientious objector claim, which appellant allegedly was ready to assert on March 15, 1966, had matured prior to the time he was ordered to report for induction, and; (b) the appellant's objection to war was directed only to the war in Viet Nam, and derived from political or philosophical views.

VI

ARGUMENT

A. THE PRESUMPTION THAT OFFICIAL
DUTY WAS REGULARLY PERFORMED
SHOULD BE APPLIED.

Appellant asserts that he was denied procedural due process by the refusal of a Board employee to give him a Selective Service Form 150, on which he might assert a claim for exemption from military service as a conscientious objector. This refusal allegedly took place on March 15, 1966, the day before appellant was scheduled to report for induction. The Selective Service File does not indicate a request or refusal. There is a document signed by appellant in the file dated March 15, 1966, which does not complain of such a refusal, or attempt to set forth the basis for a conscientious objector claim.

The first notice that the government had of appellant's allegation was at the time of trial, during his direct examination. No effort was made by appellant to subpoena the Board employee, and the government did not have any employees available to testify, since it was without notice of the allegation. No effort was made to file a conscientious objector claim after refusing to report for induction.^{1/}

^{1/} This was done by the registrant in Davis v. United States, 374 F.2d 1 (5th Cir. 1967). In Davis, the Form 150 filed after refusal to report was fully processed, and the claim eventually denied. Only after the claim was acted upon was an indictment brought.

Under these circumstances we contend that the presumption should be applied that official duty was regularly performed. This presumption does not automatically disappear in the face of conflicting evidence. California Evidence Code, § 664. It may be applied in a criminal proceeding to establish the prosecution's case, provided that the defendant does not raise sufficient doubt as to the existence of the presumed fact. California Evidence Code, §607. There is no suggestion in the instant case that the trier of fact applied an improper burden of proof, and it must be assumed that the trial court applied correct standards of proof, and was satisfied that the evidence was sufficient beyond a reasonable doubt to warrant a finding of guilty. People v. Clements, 202 Cal. App. 2d 284, 286 (1962); Cf. People v. Cruz, 178 Cal. App. 2d 83, 88 (1960).

Reliance on the presumption of regularity does not conflict with the presumption of innocence benefitting the accused. Keene v. United States, 266 F. 2d 378, 380 (10th Cir. 1959). There, regarding the "legal presumption which imparts prima facie validity to the proceedings of the draft board," it was stated:

" . . . the presumption which attends these proceedings is founded in the policy of the law, and is derived from the faith and credit we owe to official acts of duly constituted authority. As such, it is legally sufficient to sustain the burden of regularity and validity until dissipated by some probative evidence to the contrary. "

266 F. 2d at p. 380.

See People v. Graham, 191 Cal. App. 2d 521, 532 (1961), cert. denied 368 U.S. 864. We submit that appellant's own testimony at the trial was not sufficiently convincing to overcome the presumption of regularity, and that the trial court's holding, containing an implicit finding to this effect, should not be disturbed. People v. Siemsen, 153 Cal. 387, 390-391 (1908).

In Knox v. United States, 200 F.2d 398 (9th Cir. 1952), relied upon by appellant at page 5 and 6 of his brief, there were indications in the Selective Service File itself that the local board had failed to take necessary action on a conscientious objector claim. Cf. Elder v. United States, 202 F.2d 465, 468 (9th Cir. 1953), cert. denied 345 U.S. 999. In the absence of an indication of irregularity in the file, we submit that the presumption of regularity is applicable, and that it was not rebutted by the testimony of appellant. People v. Siemsen, supra.

B. EVEN IF A FINDING OF REFUSAL TO
FURNISH A FORM 150 WAS WARRANTED
BY THE EVIDENCE, THE ORDER TO
REPORT FOR INDUCTION SHOULD NOT
BE VOID.

Appellant could not have asserted any claim for a new classification, including a conscientious objector classification, after receiving his Order to Report for Induction, unless he could show a change in status resulting from circumstances over which he had no control. 32 C.F.R., §1625.2; Boyd v. United States, 269 F.2d 607 (9th Cir. 1959); Keene v. United States, supra;

Cf. United States v. Parrott, 370 F. 2d 388, 396 (9th Cir. 1966), cert. denied (citation not yet reported); United States v. Gearey, 368 F. 2d 144 (2d Cir. 1966). In Gearey, supra, it was stated that where a conscientious objector claim had matured before notice was sent to report for induction, the registrant's I-A classification could not be reopened. 368 F. 2d at page 149. We submit that the file shows that appellant's beliefs in opposition to war, whatever their nature, were fully expressed before receiving his notice to report for induction [T. 24; compare T. 62]. Appellant admitted this in his testimony, when he agreed that the basis for his belief was the same in October, 1965 (before being ordered to report), as it was in March, 1966 (after being ordered to report) [Reporter's Transcript, pages 11, 12].

If appellant, had he asserted a conscientious objector claim, would not on this record have been entitled to a reopening of his classification and consequent cancellation of his induction order, we submit that the logic of United States v. De Lime, 223 F. 2d 96, 100-101 (3rd Cir. 1955), applies. Even if procedural requirements were not met, the resulting refusal to reopen his classification was mandatory. Cf. MacMurray v. United States, 330 F. 2d 928 (9th Cir. 1964).

Alternatively, the reasoning in De Lime and MacMurray, supra, may be directly applicable to this case, if the court regards this record as establishing on its face that appellant's objections to war were non-religious in nature.

VII

CONCLUSION

For the reasons stated, the decision of the trial court
should be affirmed.

Respectfully submitted,

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WILLIAM P. LAMB,
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William P. Lamb

WILLIAM P. LAMB

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21879 ✓

JAMES DONALD EDWARDS,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21879

JAMES DONALD EDWARDS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the Central District of California.

The appellant was sentenced to the custody of the Attorney General for a period of three years after a one count conviction for violation of Title 50, United States Code App., Section 462 (knowingly fail and refuse to be inducted into the Armed Forces of the United States), Universal Military Training and Service Act [CT 28].¹

1. CT refers to the Clerk's Transcript.

Title 18, United States Code, Section 3231, conferred jurisdiction in the District Court over the prosecution of this case. The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 37(A)(1) and (2) of the Federal Rules of Criminal Procedure. Notice of Appeal was filed in the time and manner required by law [CT 31].

STATEMENT OF THE CASE

The indictment charged appellant with a violation of of the Universal Military Training and Service Act for refusing to submit to induction [CT 2].

Appellant pleaded "not guilty" and was tried by the Honorable Jesse W. Curtis, District Judge, sitting alone without a jury. Appellant was found guilty and sentenced to imprisonment for a period of three years [CT 28].

A written motion for judgment of acquittal was filed during the trial [CT 21].

THE FACTS

On April 8, 1964, appellant filed his Classification Questionnaire (SSS Form No. 100) and signed Series VIII [Ex. 7]² indicating he was a conscientious objector.

He was mailed the Special Form for Conscientious Objector (SSS Form No. 150) and timely returned it, fully executed [Ex. 12-15]. In this form he showed he believed

2. Ex. refers to the government's exhibit, the complete Selective Service System file of the appellant.

in a Supreme Being and, in an appended statement (the space provided on the form for answers being only a few lines each) showed that his religious beliefs took precedence over any earthly command, the origin of his beliefs being "a thorough study of the Bible with my family" and, in all other respects made as full a showing as is possibly required, presenting at the very least a prima facie case [Ex. 16].

Nevertheless, despite anything in the file to the contrary, or in existence, he was classified in Class I-A and subsequently ordered to report for induction.

QUESTION PRESENTED

I

Was the denial of conscientious objector classification to appellant by the Selective Service System without basis in fact, arbitrary and contrary to law? This question was raised by the Motion for Judgment of Acquittal.

II

Was the appellant prejudiced by the interchange of panel members during his processing? This question was also raised by the motion.

III

Was the appellant properly processed at the induction station by the proceedings actually accorded him? This question was also raised by the motion.

SPECIFICATION OF ERROR

I

The District Court erred in denying the Motion for Judgment of Acquittal.

SUMMARY OF ARGUMENT

I

Appellant made out a prima facie case as a conscientious objector by submitting a Form 150 showing him to be a member of Jehovah's Witnesses. The task of the court is to search the record for some affirmative evidence to support the local board's denial of I-O classification to appellant. The record in this case is barren of any such evidence. *Dickinson v. United States*, 74 S. Ct. 152 (1953).

II

The sole evidence in the record shows there was, at the least doubt as to whether he was administratively processed by the right board members. This is contrary to law and he should have been acquitted.

III

The un rebutted evidence in the record shows that the induction ceremony was contrary to law and prejudicial to appellant.

ARGUMENT

I

The Denial of a Conscientious Objector Classification by the Selective Service System Was Without Basis in Fact, Arbitrary, Capricious and Contrary to Law.

Section 6 (j) of Title 1 of the Universal Military Training and Service Act, as amended (50 U.S.C. App. 456 (j)), provides:

“Nothing contained in this title . . . shall be construed to require that any person be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . .”

Section 1622.14 (A) of the Selective Service Regulations [32 C.F.R. 1622.14 (A)] provides:

“1622.14 Class I-O: Conscientious Objector Available for Civilian Work, Contributing to the Maintenance of the National Health, Safety or Interest.—(A) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.”

The local board's duties and the courts' scope of review in draft cases were spelled out by the United States Supreme Court in *Dickinson v. United States*, 74 S. Ct. 152, 157, 158, 346 U.S. 389 (1953):

"The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. . . . If the facts are disputed the board bears the ultimate responsibility for resolving the conflict—the courts will not interfere. Nor will the courts apply the test of 'substantial evidence'. However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption."

". . . when the uncontroverted evidence supporting the registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

The dissenting opinion of Mr. Justice Jackson puts the proposition more bluntly (74 S. Ct. 152, 159):

". . . Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case. . . ."

In the present case, appellant made out a *prima facie* case for a I-O classification when he filed with the local board his Form 150 in which he claimed conscientious objection to war in any form based upon religious training and belief.

The government's case (the appellant's Selective Service file placed in evidence as the government's exhibit) is totally barren of any evidence whatsoever tending to cast the slightest doubt on appellant's sincerity.

Appellant claimed membership in the Jehovah's Witnesses.

The Court may take judicial notice of the fact that although Jehovah's Witnesses usually have trouble later in the administrative procedure, because of their claim to be ministers, they almost never have trouble getting a I-O classification. There is not a single shred of evidence in the record to cast doubt on appellant's bona fide membership in Jehovah's Witnesses and belief in their creed.

Thus the local board's denial of I-O classification to appellant was without basis in fact and upholding that arbitrary classification would be contrary to the rule of law as set forth in Dickinson.

II

Appellant Was Administratively Processed by Local Board Members Who Were Not Authorized to Process Him and Contrary to Law.

The Selective Service System regulations (32 C.F.R. § 1600, et seq.) have the full force and effect of law. *Singer v. United States*, 323 U.S. 338, 345-346 (1945).

Section 1604.52a Panels of Local Boards.—(a) Whenever the State Director of Selective Service determines that the work load of a local board has become too great to be handled without undue delay, he is authorized to establish panels of such local board in such number as he may determine, but not to exceed one panel for each three local board members. The jurisdiction of each such panel shall be the same as the jurisdiction of the local board subject to the limitations contained hereafter in this section.

(b) Whenever the State Director of Selective Service establishes panels in a local board, the chairman of such local board shall assign at least three members of the local board to each such panel. Each local board member, including the chairman, shall be assigned to a panel. No members shall be assigned to more than one panel at the same time.

(c) The chairman of the local board shall not alter the assignment of members of the local board to panels without the written consent of the State Director of Selective Service. A member of a local board shall not be qualified to vote on any question or classification which arises before any panel of the board except the one to which he is assigned, but all questions arising in the selection of registrants for armed forces physical examination or for induction, except questions concerning the classification of registrants, shall be determined by the local board as a whole without regard to panel assignments.

(d) A majority of the members of the local board assigned to a panel of the board shall constitute a quorum for the transaction of business before that panel. A majority of the members assigned to a panel who are present at any meeting of the panel at which a quorum is present shall decide any question or classification properly before the panel. Every member of the panel present, unless disqualified, shall vote on every question or classification. In case of a tie vote on any question or classification, the panel shall postpone action on the question or classification until it can be decided by a majority vote.

(e) The chairman of the local board shall assign the cases of registrants to the panels thereof in such

manner that the resultant classification actions shall establish a single availability list for the board so that registrants shall be available generally in the order of their liability for service in the armed forces. Except as otherwise provided in this paragraph, no panel of a local board other than the panel to which the case of a registrant is initially assigned shall determine any question or classification with respect to such registrant. After the case of a registrant has been assigned to a panel, the chairman of the local board may reassign any such case to another panel when he determines such action is necessary in order to prevent undue delay in the processing of registrants. Whenever, because of the provisions of paragraph (a) of Section 1604.55, a majority of a panel is disqualified to act on the case of a registrant assigned to the panel, the chairman of the local board shall reassign the case to another panel, or, if all of the panels of the local board are similarly disqualified to act on the case, the local board shall request the State Director of Selective Service to designate another local board to which the registrant shall be transferred for action on his case. The panel to which the case of a registrant is reassigned shall thereafter retain jurisdiction to determine all questions or classifications with respect to that registrant to the same extent as though it were the panel of initial assignment.

It appears from the oral testimony in court, and un rebutted, that the board members, although assigned to independent panels, operate independently, that is, they operate on work of other boards with respect to prohibited activity. The testimony of the Group [cluster of local boards, officed together] Coordinator shows that what

members did in various registrants' cases could not be distinguished. Reporter's Transcript page 11, line 18 on to page 20, line 11.

This type of loose procedure has been judicially condemned by various courts. Two illustrations are submitted:

In *Olvera v. United States*, 5 Cir., 1955, 223 F.2d 880, 822, the court concluded:

"Under this principle, it is of the essence of the validity of board orders and of the crime of disobeying them that all procedural requirements be strictly and faithfully followed, and that a showing of failure to follow them with such strictness and fidelity will invalidate the order of the board and a conviction based thereon."

In a recent case in the Central District of California, the court, in acquitting the defendant in *United States v. Wilson*, No. 468 Cr., on June 27, 1967, in a comparable situation, stated to the United States Attorney:

"And I would suggest you tell the board that they had better watch how they do these things because I will dump them again if they come back with one panel member signing for another panel member."

III

Appellant Was Not Properly Processed by the Army Men at the Induction Center.

It is well established that a clear line between civilian and military status must be maintained. This Court observed in *Chernekoff v. United States*, 9 Cir., 1955, 219 F.2d 721, 725:

“One purpose of this regulation is self-evident. It is intended to give a registrant a last clear chance to change his mind and accept induction rather than certain indictment and possible conviction for a felony carrying a maximum punishment of five years or a fine of not more than \$10,000.00 or both.”

The Court also pointed out, concerning the ceremony prescribed by the pertinent regulations:

“This ceremony must be conformed to unless the selectee himself makes it impossible.” [725]

The oral testimony (R.T. p. 22, line 21) shows the form letter account of the ceremony, pages 61-62 of the government's exhibit was incorrect in several particulars, some crucial. This testimony was unrebutted.

CONCLUSION

For the reasons given above, the judgment of the District Court should be reversed and an order entered directing the District Court to enter a judgment of acquittal.

Respectfully submitted,

J. B. TIETZ and

MICHAEL HANNON

Attorneys for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that,

in my opinion, the foregoing brief is in full compliance with those rules.

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IN THE UNITED STATES COURT OF APPEALS
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APPELLEE'S BRIEF

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FOR THE CENTRAL DISTRICT OF CALIFORNIA

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DEC 27 1967

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IN THE UNITED STATES COURT OF APPEALS
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JAMES DONALD EDWARDS,

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, James Donald Edwards, was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on November 10, 1966, in Case No. 36811-CD [C. T. 2.]^{1/} The Indictment charged a violation of Title 50 Appendix, United States Code, Section 462, Universal Military Training and Service Act; Refusal to be Inducted.

On December 19, 1966, appellant was arraigned before the Honorable A. Andrew Hauk, United States District Court Judge and

^{1/} "C. T. " refers to Clerk's Transcript of Record.

entered a plea of not guilty. Appellant was represented by retained counsel at all stages of the proceedings. On February 6, 1967, the case was called for Court trial before the Honorable Jesse W. Curtis, United States District Court Judge. It was continued for decision to February 13, 1967, on which date the defendant was found guilty. On March 20, 1967, appellant was sentenced to the custody of the Attorney General for a term of 3 years [C. T. 28]. A timely notice of appeal was filed on March 28, 1967 [C. T. 31].

Jurisdiction of the trial court was found upon Title 50 Appendix, United States Code, Section 462 and Title 18, United States Code, Section 3231. This Court has jurisdiction pursuant to Title 28, United States Code, Section 1291 and 1294.

II

STATUTES AND REGULATIONS INVOLVED

Title 50 Appendix, Section 462, United States Code, provides in part:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect to refuse

to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both"

32 C.F.R. , 1626(a) provides in pertinent part:

"The registrant, . . . may appeal to an Appeal Board from any classification of a registrant by the Local Board except . . . registrant's physical or mental condition. "

32 C.F.R. , 1626(c) provides in pertinent part:

"The registrant . . . may take an appeal authorized under paragraph (a) of this section at any time within the following period:

(1) Within 10 days after the date the Local Board mails to the registrant a Notice of Classification (SSS Form 110). "

32 C.F.R. , Section 1641.2(b) provides:

"If a registrant or any other person concerned failed to claim and exercise any right or privilege within the required time, he shall be deemed to have

waived the right or privilege. "

32 C. F. R. , 1624. 1(a) provides:

"Every registrant, after his classification is determined by the Local Board (except a classification which is itself determined upon an appearance before the Local Board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the Local Board designated for the purpose if he files a written request therefor within 10 days after the Local Board has mailed a Notice of Classification (SSS Form 110) to him. Such 10-day period may not be extended. "

III

STATEMENT OF FACTS

At the time of the trial of this case, a photographic copy of the official Selective Service System file of this appellant was offered and admitted into evidence as Government's Exhibit No. 1 [R. T. 8].^{2/} This file and the testimony of appellant during the trial revealed the following facts with respect to appellant's registration status in the Selective Service System.

^{2/} "R. T. " refers to Reporter's Transcript of Record.

The defendant registered with Local Board No. 115 on January 16, 1963 (pages 1 and 2).^{3/} On April 8, 1964, Local Board No. 115, hereinafter referred to as "the Board", received a completed Classification Questionnaire (SSS Form 100), in which the defendant claimed to be a Jehovah's Witness and signed the series requesting conscientious objector forms (pages 4-10 at page 7). On April 28, 1964, the Board received a completed Special Form for Conscientious Objector (SSS Form 150) (pages 12-16). On June 8, 1964, the Board placed the defendant in Class I-A by a vote of 2-0 (page 11). On June 9, 1964, notice of this classification was mailed to the defendant (page 11). No appeal from the Board's classification was taken by the defendant.

On May 20, 1965, defendant was ordered for an armed forces physical examination on June 11, 1965 (page 17). On June 11, 1965, the defendant reported for his physical examination and was found acceptable (page 18). On June 15, 1965, defendant notified the Board his name had been legally changed from James Donald Humphreys to James Donald Edwards (page 19). On June 15, 1965, the Board received a request for a new Form 110 from the defendant in view of this name change (page 20). At that time, defendant admitted receiving his original notice of classification mailed June 9, 1964 (page 20). On June 15, 1965, the Board also received a completed Current Information Questionnaire (SSS Form 127) from the defendant (pages 26 and 27).

^{3/} Refers to pages of appellant's Selective Service File, Government's Exhibit No. 1.

On October 25, 1965, defendant was again classified I-A by the Board (page 11). On October 29, 1965, a notice of this classification was mailed to the defendant (page 11). No appeal was taken by the defendant from the October 25, 1965 classification.

On December 23, 1965, the defendant was ordered to report for induction on January 11, 1966 (pages 29 and 48). On January 11, 1966, defendant reported to the induction center, and submitted for a pre-induction examination (pages 30-41) and completed various other forms preliminary to induction (pages 42-60). Thereafter on January 11, 1966, the defendant refused to be inducted into the armed forces (pages 61-63 and 65).

IV

QUESTIONS PRESENTED

1. Appellant's failure to prosecute an administrative appeal should preclude him from collaterally attacking his classification in this Court.
2. Appellant was properly processed by his Local Board.
3. Appellant was not improperly processed at the induction ceremony.

V.

ARGUMENT

1. APPELLANT'S FAILURE TO PROSECUTE AN ADMINISTRATIVE APPEAL SHOULD PRECLUDE HIM FROM COLLATERALLY ATTACKING HIS CLASSIFICATION IN THIS COURT.
-

Appellant's prime contention is that the Local Board had before it sufficient facts to warrant a conscientious objector classification. It is suggested that because of its refusal to do so, it is the duty of this honorable Court to "search the record" for affirmative evidence supporting the Local Board's denial of the requested classification. For this proposition the appellant cites the decision or the holding in Dickinson v. United States, 346 U.S. 389 (1953). (Appellant's Brief, page 4).

It is indeed established that, according to the decision in Dickinson, it is the duty of an Appellate Court to examine the record to determine if the Local Board had any evidence whatsoever which could justify its classification.

But it is also well established that the prerequisite for such judicial scrutiny is that the registrant had exhausted the remedies of administrative appeal. Evans v. United States, 252 F.2d 509 (9th Cir. 1958).

The appellant in this case at no time appealed either of his 1-A classifications. Government Exhibit No. 1, Selective Service File, reflects that on June 9, 1964 notice of the 1-A classification was sent to appellant (Selective Service File, p. 11). In addition,

2. APPELLANT WAS PROPERLY PROCESSED BY
HIS LOCAL BOARD.

The appellant's argument relative to the unauthorized processing by the Local Board is as follows: "It appears from the oral testimony in court, and unrebutted, that the board members, although assigned to independent panels, operate independently, that is, they operate on work of other boards with respect to prohibited activity. The testimony of the Group [cluster of local boards, officed together] Coordinator shows that what members did in various registrants' cases could not be distinguished. Reporter's Transcript page 11, line 18 on to page 20, line 11." (Appellant's Brief, pp. 9 and 10).

A reading of the testimony of Margaret Okerstruom, Coordinator of Local Board Group E, of Downey, California, does not substantiate this contention. Mrs. Okerstruom, called as a witness by the defendant, testified that she has been Coordinator for Local Board Group E since 1950 (R. T. 10), and that at the time of trial she was unable to determine which board members participated in the classification of the appellant for the reason that she did not have with her the requisite documents (R. T. 19 and 20).

An examination of her testimony, the only witness who testified relative to the composition of the boards, indicates no irregularity whatsoever as to the classification of the appellant. The mere fact that the witness did not have with her information as to

which board members voted on defendant's classification should in no way lead to the conclusion that, had they been produced, it would have been shown that an irregularity had existed.

Appellant has cited the case of Olvera v. United States, 223 F.2d 880, 822 (5th Cir. 1955), as standing for the proposition that the type of procedure as employed by appellant's board " . . . has been judicially condemned by various courts" (Appellant's Brief, p. 10).

The holding in the Olvera case has no application to the issue raised by appellant. The case concerned the issue of the arbitrary refusal of the local board to reopen and reconsider a registrant's classification. The court held that the board's refusal was unreasonable and arbitrary and hence ousted the board of its jurisdiction to proceed further unless it acted on the registrant's request. It was in the context of that fact situation that the court held the Local Board to a strict compliance with regulations.

3. APPELLANT WAS NOT IMPROPERLY PROCESSED AT THE INDUCTION CEREMONY.

Appellant, in his brief, has argued that "it is well established that a clear line between civilian and military status must be maintained," and contends that "the oral testimony (R T. p. 22, line 21) shows the form letter account of the ceremony, pages 61 and 62 of the Government's exhibit was incorrect in several particulars, some crucial. This testimony was unrebutted." (Appel-

ant's Brief, pp. 10 and 11).

Appellant has failed to mention any examples of such discrepancies, has not pointed out which instances could be deemed as "crucial", or more importantly, has not disclosed what possible prejudice the appellant may have suffered.

An examination of the trial record would, it is submitted, clearly reflect an absence of substantial deviation from the normal practice and the absence of any prejudice to the rights of the accused.

The decision in Chernekov v. United States, 219 F.2d 721 (9th Cir. 1955), was cited by the appellant. In that case, the registrant at the time of induction was not given the opportunity to "step forward" because the Army authorities deemed it a useless formality. The court held, as one of its grounds for reversal, that the appellant ought to have been given the opportunity " . . . a last clear chance to change his mind and accept induction rather than certain indictment" United States v. Chernekoff, 219 F.2d 721, 725 (9th Cir. 1955)

But no such issue appears in the instant case. The appellant himself admitted at the trial that he was given two opportunities to step forward and on each occasion refused (R. T. 23 and 24).

Appellant was, in the words of the Chernekov decision given "a last clear chance" to accept induction. Knowing the consequences, he refused induction. It is submitted that a reading of the record reflects no possible prejudice to the rights of the appellant.



VI

CONCLUSION

For the reasons stated above, it is respectfully submitted
that the decision of the District Court should be affirmed.

Respectively submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

ERIC A. NOBLES,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Eric A. Nobles

ERIC A. NOBLES

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21879

JAMES DONALD EDWARDS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF

FILED

JAN 10 1968

WM. B. LUCK, CLERK

J. B. TIETZ

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Attorney for Appellant

AN 151538

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21879

JAMES DONALD EDWARDS,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF

I.

OUR NO-BASIS IN FACT POINT

In our Opening Brief we showed that appellant had made out a prima facie case for a conscientious objector's classification. We argued that there was no basis in fact for denying him such a classification, either in the record, or in fact.

In Appellant's Brief no effort is made to dispute our assertion of a prima facie case or that there was anything in the file, or in fact, that rebutted appellant's factual showing.

Appellee relies on its argument—in bar [failure to appeal], and is content to conclude: “It is respectfully submitted that no facts have been presented in the instant case to warrant a change in the established law:” [at the bottom of its second and final page of argument on this subject page 8].

Facts We Present.

1. Appellee correctly related that “on June 9, 1964, notice of this classification (I-A) was mailed defendant. . . No appeal from the Board’s classification was taken by the defendant.” (Page 5). “On October 25, 1965, defendant was again classified I-A by the Board. . . , on October 29, 1965, a notice of this classification was mailed to the defendant. No appeal was taken from the October 25, 1965, classification.” (Page 6). *The dates are significant.*

2. In 1966 the President appointed a select Commission to study the operation of the then draft act. It reported in February, 1966*.

It found a number of weak spots, including ones relating to administrative appeals.

3. Immediately, by Executive Order, the following three changes were made, all bearing on the point that we now raise as our response to appellee’s failure to exhaust argument: There is reason for this Court to turn a blind eye on a registrant’s failure to take an appeal, in those instances when the failure occurred before the following changes:

*Who Serves When Not All Serve? Report of the National Advisory Commission on Selective Service, Burke Marshall, Chairman, U. S. Government Printing Office, \$1.50.

a. The period for an administrative appeal was changed from 10 to 30 days;

b. A new notice card (SSS Form No. 110) was formulated so stating the new, 30 day period;

c. An entirely new form (SSS Form No. 217) was developed and mailed to each registrant classified in Class I-A. It is not post-card size and in small print (as is the SSS Form No. 110), but is 8 1/2 x 11" in size, and in large type, and it informs the registrant that there is an Appeal Agent who can help him and is available for a consultation.

Also, a new letter-size form has been developed for such an appointment (SSS Form No. 218). Copies of these new forms are made part of this brief, as Appendix A, and Appendix B.

Also appended, and marked Appendix C, is a new directive of Lt. Gen. Hershey, signed March 6, 1967, and directed to Appeal Agents. Its paragraph 2 caps our argument.

This is why we contend that appellant's case should be determined on its merits, not on the now less applicable judicially-constructed bar of exhaustion of administrative remedies.

II.

OUR ADMINISTRATIVE PROCESSING POINT

Appellant showed that "panel" members of a local board are required to operate solely on their own panel's registrants; that the testimony of the chief clerk was "that what the panel members of the various panels of this local board members did in various registrant's cases could not

be distinguished." Reporter's Transcript page 11. (Appellant's Opening Brief. pp. 9-10)

We argued that this threw a doubt on the validity of the processing and that there was therefore presented a doubt concerning the proof of guilt.

Appellee argues that "an examination" of the Coordinator's testimony indicates no irregularity. . . ."

We submit that when members of one panel may be working (doubtless as a matter of administrative convenience) on registrants of another panel that this is a grave irregularity by reason of the regulations, §1604. 52 a(e), last sentence, set forth in our Opening Brief on page nine.

The same kind of an irregularity was present in an unreported case decided June 27, 1967 by the Honorable A. Andrew Hauk, Judge Presiding in *U.S.A. v. Carl Dean Wilson*, No. 468—Criminal. After finding the defendant not guilty the court said to the United States Attorney: "And I would suggest you tell the board that they had better watch how they do these things because I will dump them again if they come back with one panel member signing for another panel member."

(At this time court was adjourned.)

III.

OUR INDUCTION PROCESSING POINT

We argued that the record showed reversible irregularity.

Appellee argues we, "failed to mention any examples" and that there was "an absence of substantial deviation from the normal practice."

It is true that our Opening Brief only gave the page and line of the oral testimony and the pages of the Selective Service file.

We now mention and particularize:

The oral testimony on this starts on page 22 of the reporter's transcript. We put the government's exhibit (the Selective Service file) before the witness, the defendant. He testified that sheets 61 and 62 of the exhibit were incorrect in that (1) they didn't "give" him the oath at the time and place where the exhibit, pages 61 and 62, stated [Rep. Tr. 22, lines 21-], (2) he was taken out of the room [Rep. Tr. 22, lines 7-10], (3) he was then given the oath privately [Rep. Tr. 23, lines 24-25]. This is contrary to AR 601-270, the regulation that controls, in that the oath is to be given *only* after induction, that is, after the act of stepping forward. (4) He was not given the warning of the penalty [Rep. Tr. 24, and 25, lines 3 and 4].

We showed, in our Opening Brief, that it has been held that such a failure is fatal. There was no cross-examination on this particular failure although the induction ceremony was covered by two pages of questioning and the cross-examiner showed the same indifference to the necessity of the penalty explanation as the un rebutted testimony of defendant showed was true of the inducting officers.

Judge Jertberg had a similar situation, as a District Judge on January 21, 1958, in *U.S.A. v. Lindsay*, No. 3496—N.D. at Fresno. His filed opinion, in its portion pertaining to our point says:

"In *Chernekoff v. United States*, 219 F. 2d 721 (Ninth Circuit) the court stated at page 725, referring to the Army regulation:

"One purpose of this regulation is self-evident. It is intended to give a registrant a last clear chance to change his mind and accept induction rather than certain indictment and possible conviction for a felony carrying a maximum punishment of five years or a fine of not more than \$10,000 or both. The regulation is couched in mandatory, not discretionary, language."

The plaintiff contends that in the absence of evidence to the contrary, it must be presumed that the defendant was advised by the induction officials that the offense of refusing to submit to induction would subject the defendant to punishment by imprisonment for not more than 5 years or a fine of not more than \$10,000, or both, because of the presumption that public officials perform their duties according to law. The vice in this argument is that even if the letter (Plaintiff's Exhibit No. 1, page 21) does not overcome the presumption of regularity in showing that the induction officials did not follow the regulation, the letter raises a reasonable doubt that the regulation was followed. "This doubt might have been overcome if the government had elected to call as witnesses the induction officials who might have testified that the warning given the defendant included the nature and extent of the possible punishment." The government, however, elected to stand on the Selective Service file. It may well be that if the defendant had been advised of the severity of the punishment that he would have changed his mind. As the Court in the *Chernekoff*

case, at page 725, stated: "It does not matter that he might not have changed his mind. He should have been given the opportunity granted him by the Army's own regulation to seriously reflect and to let actions speak louder than words."

In this case, the defendant is presumed to be innocent until his guilt has been established beyond a reasonable doubt. Under the evidence in this case, and giving to the defendant the presumption of innocence to which he is entitled, I am compelled to state that I have a reasonable doubt that the defendant was given the required warning. The warning given him simply stated that conviction would subject him to punishment. He was entitled to know the severity and extent of the punishment which might have had the effect of causing the defendant to change his mind.

In connection with the third ground of the motion for judgment of acquittal, the defendant contended that the file failed to disclose that he had taken the "loyalty oath". During the course of the trial, the loyalty oath was produced from the induction center, and received in evidence as Plaintiff's Exhibit I-A. After viewing the oath as signed by the defendant, his counsel abandoned this contention.

The facts and the law in this case require that the motion of the defendant for judgment of acquittal be granted and it is so ordered. Judgment of acquittal of the defendant will be entered and the bond of the defendant exonerated.

The Clerk of this Court is directed to forthwith mail copies of this order to counsel.

DATED: January 17, 1958.

GILBERT H. JERTBERG

Judge, United States District Court

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ

410 Douglas Building

257 South Spring Street

Los Angeles, California 90012

Attorney for Appellant

EXHIBIT "A"**SELECTIVE SERVICE SYSTEM****Notice of Right to Personal Appearance and Appeal**

(Seal)

Approval Not Required

Local Board No. 101
 Los Angeles County
 1301 Westwood Blvd.
 Los Angeles, Calif. 90024
 (Local Board Stamp)

Gary D. Standard
 3042 Earlmarr Dr.
 Los Angeles, Calif. 90064

Date of mailing
 May 19 1967
 (Month) (Day) (Year)
 Selective Service No.
 4 | 101 | 48 | 526

Enclosed is your Notice of Classification. Your right to ask for a personal appearance or an appeal within 30 days is prescribed on the reverse side of this Notice.

Each local board has available a Government Appeal Agent to aid you with a personal appearance, an appeal, or any other procedural right. The Appeal Agent or his representative will give you legal counsel at no charge.

If you should desire a meeting with him, this office will arrange a time and place for such meeting upon request.

The Government Appeal Agent for this local board is:

Name Alfred H. Krieger.

/s/ Anne C. Phillips
 Anne C. Phillips
 Clerk of Local Board

EXHIBIT "B"

SELECTIVE SERVICE SYSTEM

Notice of Appointment

(Seal)

Approval Not Required.

Local Board No. 114
 Los Angeles County
 11214 So. Brookshire Ave.
 Downey, Calif. 90241
 (Local Board Stamp)

Joel Laurance Nossoff
 11454 E. Winchell Street
 Whittier, California 90606

Date of mailing

July 12, 1967
 (Month) (Day) (Year)
 Selective Service No.
 4 | 114 | 46 | 1919

The appointment you have requested has been arranged
 with Mr. McManus Government Appeal Agent at 11214 So.
 (Name) (Title)

Brookshire, Downey, California on July 24, 1967 at 2:30 p.m.
 (Place of appointment) (Date) (Hour)

/s/ M. Okerstrom
 Marguerite Okerstrom
 Executive Secretary of Local
 Board Group "E"

IMPORTANT NOTICE

This appointment is made to enable you to take advantage of the advice and assistance of a member of the uncompensated staff of your selective service local board.

These officials, Government Appeal Agents, Associate Government Appeal Agents, and Advisors to Registrants, are available to every selective service registrant. They are appointed to give you advice and assistance in any selective service matter. If you have moved from the area of your own local board, you may contact any local board for information.

The local board with which you are registered will retain jurisdiction over you, even though you should move from the geographic area of the local board. You should notify your local board of any change of address or any change in your status which could change your classification.

It is important that you keep the appointment scheduled above. If you are unable to do so, contact the local board clerk immediately, giving the reason you are unable to appear, and request another appointment, if desired.

EXHIBIT "C"

NATIONAL HEADQUARTERS SELECTIVE SERVICE SYSTEM

1724 F Street NW.

Washington, D.C. 20435

Address Reply To

(Seal)

The Director of Selective Service

MEMORANDUM TO GOVERNMENT APPEAL AGENTS
(No. 1)

ISSUED: March 6, 1967

1. This is the first of a series of Memorandums to Government Appeal Agents. The purpose is to advise Government Appeal Agents with respect to legal trends in Selec-

tive Service, their relationship to the Director's policies, and the impact of particular decisions on the administration of the selective service law.

2. It has been reported to me that some registrants have been confused regarding their appeal rights, and the process of taking an appeal, and were not aware that a Government Appeal Agent was available to advise them. I have now issued a Local Board Memorandum which will require the local board to notify each registrant who is placed in either Class I-A, I-A-O, or I-O that this advice is available, giving the name of the Government Appeal Agent. If advice is sought the local board clerk will arrange for a meeting.

3. I appreciate very much the loyal and unselfish service which has been rendered to the Nation by our Government Appeal Agents. It is hoped that the comments and reports on current legal problems and trends which will appear in future issues of these memorandums will be of assistance by saving the time that Appeal Agents now spend in research in order to keep familiar with decisions in selective service cases which have been handed down since the last edition of "Legal Aspects of Selective Service." This publication was issued for the use of Government Appeal Agents and was last revised in 1963. I urge your continued, but perhaps more vigorous, assistance to registrants.

/s/ Lewis B. Hershey
Director

INSURE FREEDOM'S FUTURE—AND YOUR OWN—
BUY UNITED STATES SAVINGS BONDS

W. B. LUCK, CLERK

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21879

JAMES DONALD EDWARDS,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING

J. B. TIETZ
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012
Attorney for Appellant

FILED

JUN 7 1968

WM. B. LUCK, CLERK

THE CLASSIFICATION SITUATION

There are two subdivisions to this point, and both merit further thought.

A. One reason given by the court, for rejecting a consideration of his conscientious objection point is that, in the Court's words:

"He was apparently not interested in appealing in order to obtain the conscientious objector classification (class I-O) that he here claims should have been granted him, since the record indicates that he would not have accepted the civilian work assignment required for persons so classified. See 32 C.F.R. § 1660.20." [slip op. p. 3, n. 2]

This reasoning flies in the teeth of this Court's opinion in *Franks v. United States*, 9 Cir. 1954, 216 F.2d 266:

"We are not unaware of the high probability that Franks, had he been classified I-A-O, would nevertheless have refused induction and ultimately found himself indicted in much the same manner as has happened here. Perhaps the local board and the hearing officer and the appeal board also had the feeling that they might as well classify the appellant as I-A for the reason that like other Jehovah's Witnesses he would probably refuse induction as a I-A-O.

[2] It is our view, however, that it was not for the local board, any more than it is for this court, to say that the registrant should not be placed in a certain classification merely because he did not want that classification or was seeking a lower class or would probably refuse to acquiesce in such a classification." [269]

B. The other reason was that the Court held it was precluded from considering this point because of a failure to appeal. It is true there is an abundance of authority for this position. It is also true that an argument is present (1) that the exhaustion rule was not meant for young men, without (and forbidden) counsel but was developed by the courts for corporations and (2) that the Supreme Court hasn't yet passed on it. In short, what the courts have constructed the courts can dismantle.

Counsel further represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. TIETZ

Attorney for Appellant

June 9, 1968

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21880

WALTER LEWIS GRAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

J. B. TIETZ and
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Los Angeles, California, 90012
Attorneys for Appellant

FILED

OCT 1 1967

WILLIAM R. LUCK, CLERK

E. L. MENDENHALL, Inc., 926 Cherry Street, Kansas City, Mo. 64106, HARRISON 1-3030

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21880

WALTER LEWIS GRAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the Southern District of California.

The appellant was sentenced to the custody of the Attorney General for a period of three years after a one count conviction for violation of Title 50, United States Code App., Section 462 (knowingly fail and refuse to perform civilian work, as ordered), Universal Military Training and Service Act [Tr. 32].¹

1. Tr.—refers to Transcript of Record.

Title 18, United States Code, Section 3231, conferred jurisdiction in the District Court over the prosecution of this case. The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 37 (A) (1) and (2) of the Federal Rules of Criminal Procedure. Notice of Appeal was filed in the time and manner required by law [Tr. 33].

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act for refusing to do civilian work, as ordered [Tr. 2].

Appellant pleaded "not guilty" and was tried by the Honorable Jesse W. Curtis, District Judge, sitting alone without a jury. Appellant was found guilty and sentenced to imprisonment for a period of three years [Tr. 32].

A written motion for judgment of acquittal was filed during the trial [Tr. 22].

THE FACTS

On June 16, 1964, appellant filed his Classification Questionnaire (SSS Form No. 100) and signed series VIII [Ex. 7]² indicating he was a conscientious objector.

He was mailed the Special Form for Conscientious Objector (SSS Form No. 150) and timely returned it, fully executed [Ex. 15-18]. In this form he showed he believed

2. Ex. refers to the government's exhibit, the complete Selective Service System file of the appellant.

in a Supreme Being and showed that his religious beliefs took precedence over any earthly command [Ex. 15-18].

He presented evidence showing he was a minister, in said conscientious objector form, and in other documents [Ex. 19, 21, 22, 23, 25, 26, 53, 69].

Nevertheless, despite anything in the file to the contrary, or in existence, he was classified in Class I-O. He asked for an Appearance and presented evidence he was a minister, showing it was his vocation [Ex. 19-26].

The local board and his appeal board rejected his minister claim but the appeal board reclassified him as a conscientious objector.

He was ordered to do civilian work but refused.

QUESTIONS PRESENTED

I

Was the denial of the minister's claim without basis in fact?

This question was raised by the Motion for Judgment of Acquittal [Tr. 22].

II

Was the work to which he was ordered appropriate? This question was raised by the motion [Tr. 22].

SPECIFICATION OF ERROR

I

The District Court erred in denying the Motion for Judgment of Acquittal.

SUMMARY OF ARGUMENT

I

Appellant made out a *prima facie* case as a minister. The task of the court is to search the record for some affirmative evidence to support the local board's denial of IV-D classification to appellant. The record in this case is barren of any such evidence. *Dickinson v. United States*, 74 S. Ct. 152 (1953).

ARGUMENT

I

The Draft Board Violated Defendant's Rights under the Act and the Regulations to Have His Claim for a Minister's Classification Considered Because It Completely By-Passed and Skipped Consideration of His Evidence.

The evidence shows appellant presented a *prima facie* case for a IV-D classification (minister's status). No contrary evidence, if any existed, was ever placed in the file. Therefore, he should have been classified in Class IV-D. It was incumbent on the board to place adverse evidence in the file, as a justification for rejecting his claim. *Dickinson v. United States*, 74 S. Ct. 152.

The applicable regulation of the Selective Service System, 32 C.F.R., Sec. 1623.2, requires that a registrant be classified in the "lowest" class, according to a table which places IV-D "lower" than I-O.

1623.2 Consideration of Classes.—Every registrant shall be placed on Class I-A under the provisions

of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following tables:

Class: I-A-O

I-O

I-S

I-Y

II-A

II-C

II-S

I-D

III-A

Class: IV-B

IV-C

IV-D

IV-F

IV-A

V-A

I-W

I-C

The regulation governing classification of registrants presenting evidence for a minister's status is 32 C.F.R. § 1622.43.

1622.43 Class IV-D: Minister of Religion or Divinity Student.—(a) In Class IV-D shall be placed any registrant:

- (1) Who is a regular minister of religion;
- (2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(b) Section 16 of Title I of the Universal Military Training and Service Act, as amended, contains in part the following provisions:

“Sec. 16. When used in this title— * * * (g) (1) the term ‘duly ordained minister of religion’ means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

“(2) The term ‘regular minister of religion’ means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

“(3) The term ‘regular or duly ordained minister of religion’ does not include a person who irregularly

or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

It is thus evident that "vocation" is the chief consideration. "Full-time" is nowhere mentioned; nor is "part-time" mentioned. Nor is the word "Pioneer" or any equivalent expression used. Neither hours of activity nor clerical title are recognized by the Act or the regulations as factors in classifying.

II

The Work to Which Appellant Was Ordered Was Inappropriate in That It Involved Elements Contrary to His Religion.

Appellant was ordered to do his civilian work at the Los Angeles County Department of Charities [Ex. 72]. Before being so ordered the State Director has asked the Director for such authority, stating that the work was "suitable." [Ex. 68]. The director approved [Ex. 67].

We do not contend that this work did not meet all the statutory requirements, in general.

We contend that it was not suitable, in particular, that is, as an assignment to this appellant.

The law provides that work assigned shall be "appropriate." [32 C.F.R. § 1660.1]. Where the registrant does not agree to the type suggested to him by the Selective Service System an arbitration-type of meeting is arranged [32 C.F.R. § 1660.20(c)].

Our first complaint is that the work chosen by the local board, and without the consent of the registrant, was in his own community, a violation of Section 1660.21(a), in that the local board did not make the specific finding required. See Exhibit 64 and 65. The section involved reads as follows:

1660.21 General Provisions Relating to Orders by the Local Board to Perform Civilian Work and Performance of Civilian Work.—(a) No registrant shall be ordered by the local board to perform civilian work in lieu of induction in the community in which he resides unless in a particular case the local board deems the performance by the registrant of such work in the registrant's home community to be desirable in the national interest.

Our next objection is that the work chosen did not fit his special abilities. He pointed out, in the form sent him by the local board to so state, that his special training was in the field of accounting work, for the Bureau of Public Assistance [Ex. 55]. Although such work was available [Ex. 55] it was not selected by the board.

Our final objection is that the work ordered involved duties contrary to his religious beliefs. Although the reporter's transcript is not available, as this brief is written, the records of this Court consistently show (1) the beliefs of the Jehovah's witnesses and (2) the condition at the

particular place where the appellant was ordered to perform his work. For example, see *Langhorne v. United States*, No. 21910, where the testimony showed that the work interfered with his religious (ministry) commitment because of the hours (Rep. Tr. p. 8, lines 5-). On cross-examination he spelled out the religious work he did: "I have five meetings a week that I attend, besides going in the field service. These five meetings are on Tuesday, Thursday, and Sunday, and they are from 8:00 until 9:00 on Thursday, and from 6:30 until approximately 8:45 on Sunday, and, see, this would be interfering with this because I would be on call all the time. One week I would have to miss all my meetings until they rearranged it, until I worked on the day shift." [Rep. Tr. 9, line 19].

Langhorne also showed that the work offered would involve handling blood, contrary to his religious belief and the well-known beliefs of the Jehovah's witnesses [Rep. Tr. 3/21-].

Work religiously objectionable has been held inappropriate for the alternate service contemplated by Congress.

In *United States v. Copeland*, D. Conn. 1954, 126 F. Supp. 734, it was held that work that adversely affected the religious beliefs of a registrant was inappropriate.

Likewise, in *United States of America, Plaintiff v. George Donald Sparks, Defendant*, Criminal No. IP-54-CR-30 decided by Honorable William E. Steckler, district judge, Southern District of Indiana, Indianapolis Division on February 11, 1955, the court held that the work to which Sparks had been ordered "clashed with those of sectarian principles of the defendant" and therefore acquitted him.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with instructions to grant the petition for writ of habeas corpus.

Respectfully submitted,

J. B. TIETZ and
MICHAEL HANNON
Attorneys for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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OCTOBER 20, 1967

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER LEWIS GRAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

DEC 21 1967

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
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IN THE UNITED STATES COURT OF APPEALS
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WALTER LEWIS GRAY,

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant Walter Lewis Gray was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on November 30, 1966, in Case No. 36861-CD [C. T. 2]. ^{1/} The Indictment charged a violation of Title 50 Appendix, United States Code, Section 462, Universal Military Training and Service Act; Refusal to Perform Civilian Work Assignment.

On December 12, 1966, appellant was arraigned before the

^{1/} "C. T. " refers to Clerk's Transcript of Record.

Honorable A. Andrew Hauk, United States District Court Judge and entered a plea of not guilty. Appellant was represented by retained counsel at all stages of the proceedings. On February 6, 1967, a jury trial commenced before the Honorable Jesse W. Curtis, United States District Court Judge. The decision was continued until February 13, 1967, on which date the appellant was found guilty. On March 20, 1967, appellant was sentenced to the custody of the Attorney General for a term of 3 years [C. T. 32]. A timely notice of appeal was filed on March 28, 1967 [C. T. 33].

Jurisdiction of the trial court was founded upon Title 50 Appendix, United States Code, Section 462 and Title 18, United States Code, Section 3231. This Court has jurisdiction pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES AND REGULATIONS INVOLVED

Title 50 Appendix, United States Code, Section 462, provides in part:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces

or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect to refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both. . . ."

32 C. F. R. §1624.1(a) provides:

"Every registrant, after his classification is determined by the Local Board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the Local Board designated for the purpose if he files a written request therefor within ten days after the local board has mailed a Notice of Classification (SSS Form 110) to him. Such ten-day period may not be extended."

32 C. F. R. §1625.2 provides in pertinent part as follows:

"The Local Board may reopen and consider anew the classification of a registrant . . . provided, . . . the classification of a registrant shall not be reopened after the Local Board has mailed to such registrant an order to report for induction (SSS Form

252) . . . unless the Local Board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant has no control. "

32 C.F.R. §1625.4 provides in pertinent part:

"When a registrant . . . files with the Local Board a written request to reopen and consider anew the registrant's classification and the Local Board is of the opinion that the information accompanying such a request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the Local Board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. . . ."

32 C.F.R. §1642.2 provides in pertinent part:

"When it becomes the duty of a registrant . . . to perform an act or furnish information to a Local Board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty. "

III

STATEMENT OF FACTS

At the time of the trial of this case, a photographic copy of the official Selective Service System file of this appellant was offered and admitted into evidence as Government's Exhibit No. 1 [R. T. 5]. ^{2/} This file and the testimony of appellant during the trial revealed the following facts with respect to appellant's registration status in the Selective Service System.

Defendant registered at Local Board No. 111, Los Angeles, California, on October 21, 1963 (pages 1 and 2). ^{3/} On June 16, 1964, Local Board No. 111, hereinafter referred to as the Board, received a completed Classification Questionnaire (SS Form 100) in which the defendant requested to claim status as a conscientious objector (pages 4-10 at page 7). On July 6, 1964, the Board received a completed special form for conscientious objector (SSS Form 150) (pages 15-18).

On July 9, 1964, the Board by a vote of 3-O classified the defendant 1-A. On the same date, a notice of this classification was mailed to the defendant (SSS Form 110) (page 11). On July 17, 1964, the Board received a letter from the defendant requesting a personal appearance (page 19). On August 12, 1964, the defendant appeared before the Board. The defendant at this time indicated

^{2/} "R. T. " refers to Reporter's Transcript of Record.

^{3/} Refers to pages of appellant's Selective Service File, Government's Exhibit No. 1.

that he was not a regular pioneer but presently is serving in the capacity of a vacation pioneer which he performs approximately six months of the year and works the remaining six months. The defendant requested a classification in Class 4-D. The registrant also indicated that he could not accept civilian work in lieu of induction as it would be against his conviction (page 21).

On August 12, 1964, the Board again classed the defendant in Class 1-A by a vote of 3-O (page 11). A notice of this classification was again mailed to the defendant (page 11). On August 21, 1964, the Board received a letter from the defendant indicating his desire to appeal his classification (page 24). Attached to the letter of August 21, 1964, the defendant enclosed a further memorandum indicating again that he was at present a vacation pioneer minister and had applied for status as a full-time minister (page 11).

On September 17, 1964, the Board forwarded the defendant's file to the Appeal Board (page 11). On October 29, 1964, the Appeal Board tentatively determined that the registrant should not be classified in I-O or a lower class and forwarded the file to the Department of Justice (page 11). On July 21, 1965, the Department of Justice wrote the Appeal Board and recommended that the defendant's claim as a conscientious objector should be sustained and that he be classified in Class I-O (pages 29-33). On September 30, 1965, the Appeal Board by a vote of 3-O classified the defendant in Class I-O (page 35). On October 8, 1965, notice of this classification was mailed to the defendant (SSS Form 110) (page 11).

On October 19, 1965, the Board received a letter from the

defendant stating his intent to appeal his classification in Class I-O, and his desire to be placed in Class 4-D (page 36). At that time, the defendant indicated he averaged a total of 18 hours per month to the ministry (page 36). On October 25, 1965, the Board wrote the defendant indicating "that you do not have the right to appeal the decision of the Appeal Board inasmuch as there was no dissenting vote in their decision". The Board further indicated that if the defendant received a permanent pioneer appointment verification of this status should be reported to the Local Board at which time consideration of the defendant's classification would again be reviewed (page 38).

On November 23, 1965, the defendant was ordered for an armed forces physical examination to be given on December 10, 1965 (page 39). The defendant reported on December 10, 1965 for his physical examination at which time he was found acceptable for service (pages 40-51). On January 24, 1966, the Board received an incomplete special report for Class I-O registrants (SSS Form 152) in which the defendant failed to indicate three types of civilian work he would be willing to perform in lieu of induction. Attached to the form the defendant affixed a note in which he stated, "I am unable to pick any type of civilian work to perform because I feel that I cannot in accordance with ministerial training . . .". The defendant further added that he feels that he is entitled to a 4-D ministerial exemption (pages 52-56).

On January 28, 1966, the Board wrote the defendant a letter setting forth three types of civilian work acceptable in lieu of

induction (page 59). No reply to the letter of January 28, 1966 was received from the defendant (page 61). On April 29, 1966, the Board wrote the defendant requesting that the defendant meet with the Board on May 10, 1966 for the purpose of reaching an agreement as to the type of civilian work which should be performed by the defendant in lieu of induction (page 63). On May 10, 1966, the defendant met with representatives of the Local Board. At this time the defendant was shown a list of work available to him in lieu of induction. The defendant stated that he could not accept any of them, and indicated that he expected to receive his appointment as a pioneer within the next month (page 64).

On June 22, 1966, the Board mailed to the defendant an order to report for civilian work and statement of employer (SS Form 153). The order indicated that the defendant should report to the Board on July 19, 1966 where he would be given instructions to proceed to the Los Angeles County Department of Charities, 1200 North State Street, Los Angeles, California (page 72). On July 19, 1966, the defendant reported to the Local Board where he was given a letter of instructions to report to the Los Angeles Department of Charities, 1200 North State Street, Los Angeles, California, not later than July 20, 1966 for work as an institutional helper (pages 70-71). On July 19, 1966, defendant reported to the Los Angeles Department of Charities, 1200 North Spring Street, Los Angeles, California, and there refused any and all positions assigned (page 72).

IV

QUESTIONS PRESENTED

1. At the time appellant was ordered to perform a civilian work assignment, he was properly classified I-O.
2. Appellant was properly ordered to perform a civilian work assignment.

V

ARGUMENT

1. AT THE TIME APPELLANT WAS ORDERED TO PERFORM A CIVILIAN WORK ASSIGNMENT, HE WAS PROPERLY CLASSIFIED I-O.
-

The appellant's contention is essentially as follows:

"The evidence shows appellant presented a prima facie case for a IV-D classification (minister's status). No contrary evidence, if any existed, was ever placed in the file. Therefore, he should have been classified in Class IV-D. It was incumbent on the board to place adverse evidence in the file, as a justification for rejecting his claim. Dickinson v. United States, 74 S. Ct. 152." (Appellant's Brief, page 4).

An examination of appellant's Selective Service File does, however, reflect a factual picture quite different from that portrayed by the appellant. The appellant was initially classified 1-A on September 9, 1964 and subsequently appeared before the Board on August 22, 1964 for a personal appearance (Selective Service File, page 21). It was at this time that the appellant indicated that he was doing part-time work with the church while he was employed full-time as a clerk working for Los Angeles County. After the Board again reclassified the appellant 1-A and after the Appeal Board tentatively determined he should not receive a classification below that of I-O, the file was then forwarded to the Department of Justice pursuant to the applicable regulations.

A hearing was held before a Justice Department hearing officer on June 3, 1965 at Fullerton, California. At this time, the following facts, among others, were presented to the hearing officer: that appellant was active with the Jehovah's Witnesses since 1963, that he was employed by the Los Angeles County Bureau of Public Assistance, and that he regarded the employment as a means to pursue his ultimate vocation as a minister of Jehovah's Witnesses faith. Based on this information, the hearing officer recommended to the Appeal Board that the appellant be classified in Class I-O (Selective Service File, page 30).

It is indeed clear that an appellate court may not interfere with a registrant's classification unless it finds that there is no basis in fact for the classification or that the Local Board acted so arbitrarily and capriciously that the registrant was denied due

An examination of the record clearly reflects a basis in fact for the classification of appellant in Class I-O. It is respectfully submitted that the appellant's full-time employment with the Los Angeles County Bureau of Public Assistance along with his part-time church activities was more than sufficient to permit the hearing officer and the Appeal Board reasonably to conclude the appellant was entitled to no higher classification than that of conscientious objector (Class I-O).

2. APPELLANT WAS PROPERLY ORDERED
TO PERFORM A CIVILIAN WORK
ASSIGNMENT.

Appellant contends that the civilian work to which he was ordered was not appropriate for three reasons: (1) that it was to be performed in his own community, (2) that it did not fit his special abilities and (3) that the work involved duties contrary to his religious beliefs.

As to the first contention, the record will reflect that the appellant was given a choice of three work locations, two of which were in Los Angeles, the remaining one in Atascadero, California (Selective Service File, page 59). Appellant made no reply whatsoever to the letter offering him these choices (Selective Service File, page 61). In his interview with the Local Board on May 10, 1966, appellant stated that he would refuse any and all choices and would rather go to prison than to accept any of them (Selective Service File, page 64). It is submitted that appellant should not now be

heard to allege prejudice because the ultimate work assignment was in his own community, when his previous decision reflected a refusal to work anywhere, either in or out of his community.

Appellant next contends that the work chosen did not fit his special abilities and that he was trained in accounting work. Appellant cites no authorities, and none can be found, for the proposition that a registrant is prejudiced because the available work assignment is not conveniently tailored to his particular educational talents.

Lastly, appellant in his brief states that the work ordered involved duties contrary to his religious beliefs (Appellant's Brief, page 8). The record of trial, however, is devoid of any evidence whatsoever to substantiate such a contention.

Finally, however, the appellee would contend that the appellant should be precluded from objecting to the civilian work assignment on the grounds that he failed to employ or exhaust the administrative procedures for obtaining civilian work acceptable to him. Appellant failed to provide the Board with a list of types of work he was willing to perform as provided in 32 C. F. R. §1660.20(a), although the Board requested him to do so (Selective Service File, pages 52-56). When the Board sent the appellant a letter and offered him three types of civilian work, he made no reply whatsoever (Selective Service File, page 61). Lastly, at a meeting with the Board arranged for the purpose of reaching an agreement on civilian work that the appellant was willing to perform, he made no offer to perform any type of work. On the contrary, he indicated

that he would rather go to prison than perform any such civilian work assignment (Selective Service File, page 64). Such a failure to exhaust administrative remedies by complying with the regulations should preclude appellant from objecting to the Board's selection of suitable civilian work.

See: Badger v. United States, 322 F.2d 902

(9th Cir. 1963);

Shaw v. United States, 264 F.2d 118 (9th Cir. 1959);

Frank v. United States, 236 F.2d 39 (9th Cir. 1956);

Campbell v. United States, 221 F.2d 454

(9th Cir. 1955).

VI

CONCLUSION

For the reasons stated above, it is respectfully submitted that the decision of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
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Chief, Criminal Division,

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Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Eric A. Nobles

ERIC A. NOBLES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN VAN GELDERN,

Plaintiff and Appellant,

vs.

ABELICIO CHAVEZ, FRED N. DICKSON,
WILLIAM H. MADDEN, AUGUST G. KETIMAN,
HARRY M. KAMP, FRED G. BELL AND
DOUGLAS BARRETT,

Defendants and Appellees.

No. 21881 ✓

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HARRY M. KAMP, FRED G. BELL AND
DOUGLAS BARRETT,

Defendants and Appellees.

No. 21881

APPELLEES' BRIEF

JURISDICTION

Plaintiff and appellant has invoked the jurisdiction of this Court under Title 28, United States Code sections 1215 and 1291 which make a final order in a Federal District Court reviewable in the Court of Appeal.

STATEMENT OF THE CASE
AND OF THE FACTS

On September 22, 1966, appellant filed a complaint in the United States District Court for the Northern District of California alleging that appellees had denied him his civil rights (RT 1-24). Appellant's complaint, in essence, stated that he had been subjected to arbitrary and invidious discrimination by the California

Parole Board and that as a result had been subjected to greater and different punishment than others in similar circumstances. Appellant asserted that the Adult Authority had made an arbitrary decision to deny him parole and thereby his freedom, based upon information not arrived at by due process of law; specifically he asserted that, the California Adult Authority had no jurisdiction to consider his personal or business activities during the period of his escape. Appellant hinted at bribery and corruption of state officials and seemed to assert that personal hatred toward him by some of the defendants resulted in the Adult Authority denying him parole. The complaint prayed for \$25,000 actual damages against defendant Abelicio Chavez, and an additional \$10,000 in actual damages against the other named defendants or the total sum of \$85,000 exclusive of any and all court costs, as compensatory and punitive damages (RT 18).

On November 3, 1966, appellees filed a notice of motion and motion to dismiss and points and authorities in support of motion to dismiss. On November 7, 1966, appellant filed an affidavit for entry of default by the Clerk of the Court and on November 17, 1966, he filed a motion in opposition to the motion for dismissal.

On November 29, 1966, appellant filed a motion

for declaratory judgment and injunctive relief. On January 6, 1967, Judge Peckham of the District Court filed his order dismissing the action with leave to amend complaint. The court stated:

"If it is plaintiff's claim that he is eligible for and is being deprived of parole solely because of the bribery and corruption of state officials, then he should more particularly allege this claim. Further, if the plaintiff claims such deprivation occurs because of such a personal hatred by the Defendants or some of them of the Plaintiff as to preclude them from reaching a disposition of his parole application consistent with the rights, privileges or immunities secured by the Constitution and Laws of the United States, then he should more particularly allege this claim." (RT 65).

On January 25, 1967, appellant filed his amended complaint (RT 67-114). The amended complaint alleged that appellant's wife had talked with a former employee of the appellant, and in this conversation the former employee told appellant's wife that he had been present when the present management of plaintiff's former company stated

that they had spent a considerable amount of money to see that appellant would be retained in prison. The amended complaint also made reference to interviews appellant had had with appellees concerning appellant's conduct while he was an escapee and his general rehabilitation progress while in prison.

On February 21, 1967, appellees filed a notice of motion and motion to dismiss and memorandum of points and authorities in support of motion to dismiss. On March 2, 1967, appellant filed a motion in opposition to the motion to dismiss his amended complaint and he also filed a motion for declaratory judgment and injunctive relief.

On March 23, 1967, Judge Wollenberg of the District Court filed his order granting appellees' motion to dismiss based upon the asserted grounds^{1/} (RT 136).

On March 26, 1967, appellant filed a motion for certificate of probable cause for leave to appeal and affidavit in support thereof together with a motion to proceed in forma pauperis under Title 28, United

1. The grounds contained in defendant's motion to dismiss are set forth hereinbelow under Summary of Appellee's Argument.

States Code section 1950. Appellant's request to proceed in forma pauperis was granted by the District Court on April 19, 1967, and appellant filed his notice of appeal on April 20, 1967.

SUMMARY OF APPELLEES' ARGUMENT

The amended complaint does not state a cause of action.

A. In determining whether a prisoner is a good risk for release on parole the Adult Authority may consider his conduct in another state while he was an escapee.

B. Appellant's allegation that he is being denied parole is not an allegation of a violation of rights under the Constitution or statutes of the United States.

ARGUMENT

THE AMENDED COMPLAINT DOES NOT STATE A CAUSE OF ACTION

A. In determining whether a prisoner is a good risk for release on parole the Adult Authority may consider his conduct in another state while he was an escapee.

In his amended complaint appellant alleged that appellees denied him due process when they considered his conduct in another state while he was an escapee from a California state prison. Appellant claimed that the

evidence was hearsay and that it was inadmissible at the Adult Authority hearing. Appellant further asserted that appellee, Abelicio Chavez, was biased and personally did not like him, and for that reason denied him parole.

The District Court properly recognized that it had no power to interfere with the conduct of the Adult Authority when the "invidious discrimination" allegations of appellant were unsubstantiated, vague and indefinite thereby being insufficient to raise any issues. Hoffman v. Halden, 268 F.2d 280, 292 (9th Cir. 1959), overruled on other grounds in Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962); United States v. Bolsinger, 311 F.2d 215, 216 (3rd Cir. 1962), cert. denied, 372 U.S. 931 (1963).

Appellant's contention that due process prohibited the Adult Authority from considering his conduct in another state during his period of escape from the State of California was expressly rejected in Hyser v. Reed, 318 F.2d 225, 233 (D.C. Cir. 1963), where the court stated at page 240:

"As to the constitutional claim, it is sufficient to note that the Parole Board is not bound by the rules of evidence in considering information relating to parole violation. It is the established practice of the Board to

consider all communications, i. e., affidavits, letters, . . . even though hearsay in the strict evidentiary sense, in reaching a conclusion. This flexibility affords greater protection to alleged violators than would be allowed in an adversary proceeding with conventional rules of evidence. It permits the Board to consider all relevant information which may be helpful to the parolee."

In Washington v. Hagan, 287 F.2d 332 (3rd Cir. (1960), cert. denied, 366 U.S. 970 (1961), the court stated at page 334:

". . . [T]his matter of whether a prisoner is a good risk for release on parole or has shown himself not to be a good risk, is a disciplinary matter which by its very nature should be left in the hands of those charged with the responsibility for deciding the question. . . .

". . . [T]he problem becomes one of an attempt at rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business."

/

B. Appellant's allegation that he is being denied parole is not an allegation of a violation of rights under the Constitution or statutes of the United States.

The administration of parole is an integral part of criminal justice, having as its objective the rehabilitation of those convicted of crime and as its further objective the protection of the community. Ex parte Tenner, 128 P.2d 338 (1942); 20 Cal.2d 670 (1942). Parole, however, is not a matter of right, but a matter of grace. In re Harris, 80 Cal. App.2d 173 (1947), 181 P.2d 433 (1947); Gibson v. Markley, 205 F.Supp. 742, 743 (S.D. Ind. 1962); Martin v. United States Board of Parole, 199 F.Supp. 542, 543 (D.C. 1961); Lopez v. Madigan, 174 F.Supp. 919 (N.D. Cal. 1959). Parole, therefore, is a statutory privilege and not a matter of constitutional significance. Escoe v. Zerbst, 295 U.S. 490, 492 (1935); Jones v. Cunningham, 371 U.S. 236, 242 (1963).

Appellant's allegation that he is being denied parole is therefore not an allegation of the violation of rights guaranteed him under the Constitution or statutes of the United States. Therefore, he has failed to state a cause of action under Titles 28 or 42, United States Code sections 1331, 1343, 1392, 1979, and 1983. Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963), cert.

denied, 376 U.S. 920 (1964).

Additional authority for the dismissal of the amended complaint is that appellees, as public officers, have absolute immunity for acts done by them in relation to matters committed by law to their control or supervision. Lang v. Wood, 92 F.2d 211, 212 (D.C. Cir. 1937), cert. denied, 302 U.S. 686 (1937); Spalding v. Vilas, 161 U.S. 483, 498 (1896); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926); Taylor v. McGrath, 194 F.2d 883 (D.C. Cir. 1952); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949); Tinkoff v. Campbell, 86 F.Supp. 331, 332 (N.D. Ill. 1949).

Finally, appellees submit that a complaint for damages under the Civil Rights Act by appellant at this time is premature. The basis for appellant's prayer for damages is alleged illegal confinement in a state prison. The proper and readily available remedy is state and federal habeas corpus Van Buskirk v. Wilkinson, 216 F.2d 735 (9th Cir. 1954); Johnson v. Walker, 317 F.2d 418 (5th Cir. 1963); Davis v. State of Maryland, 248 F. Supp. 951 (D. Md. 1965). Perhaps if he does secure a final judicial determination that his confinement has been improper he may then be in a position to seek financial remuneration.

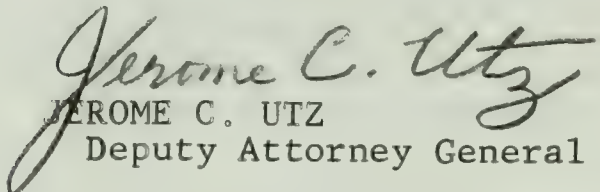
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court dismissing the amended complaint should be affirmed.

Dated: August 29, 1967

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: August 29, 1967


JEROME C. UTZ
Deputy Attorney General

No. 21,882 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FALCON PLASTICS—DIVISION OF B-D LABORATORIES,
INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside Decision and Order of
The National Labor Relations Board.

PETITIONER'S OPENING BRIEF.

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FILED

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Set Aside Decision and Order of
The National Labor Relations Board.

PETITIONER'S OPENING BRIEF.

Jurisdiction.

The National Labor Relations Board issued its Decision and Order dated May 19, 1967 [R. 64-71]* finding Petitioner, who transacts business within the jurisdiction of the Ninth Circuit [R. 20:17-27], guilty of an unfair labor practice in violation of Section 8(a)(1) of the National Labor Relations Act (29 U.S.C.A. §158 (a)(1). [R. 68.]

Accordingly, this Court has jurisdiction to review, modify or set aside the Board's Decision and Order upon petition by Petitioner, a person aggrieved thereby. (29 U.S.C.A. §160(f).) Such petition was filed June 1, 1967. [R. 73.]

*"R" refers to Record [Vol. I, Transcript of Record]; "T" refers to Reporter's Transcript [Vol. II, Transcript of Record].

Statement of the Case.

1. The Proceedings.

The Complaint alleged that Petitioner engaged in seven distinct unfair labor practices:

a. Discharged Nhoon Reese because of his union or other concerted activity [R. 5, paras. 6, 7];

b. On two separate occasions promised or granted benefits to employees if they refrained from union or other concerted activity [R. 5, para. 8(a); R. 6, para. 8(e)];

c. On two separate occasions threatened reprisals to employees if they engaged in union or other concerted activity [R. para. 8(b)];

d. Coercively interrogated an employee about his union activity [R. 6, para. 8(c)];

e. Created the impression of having engaged in surveillance of employees' union or other concerted activities [R. 6, para. 8(d)].

At the hearing, the General Counsel amended the Complaint to include an additional allegation that Petitioner violated Section 8(a)(1) of the Act by granting a premium wage rate for the swing shift and the graveyard shift. [R. 28:35-37, 53:55; T. 392:21-393:25; 396:15-16.]

Following a hearing which lasted four days and encompassed 596 pages of transcript, the Trial Examiner, in a carefully considered 23-page, single-spaced decision, found that Petitioner had not engaged in any of the alleged unfair labor practices [R. 26:33-36; 30:5-17; 33:6-13; 41:22-28] and recommended that the Complaint be dismissed in its entirety. [R. 41:24-28.]

The General Counsel filed 129 exceptions to the Trial Examiner's Decision.

The Board, upon consideration of the Trial Examiner's Decision, the entire record, and the General Counsel's 129 exceptions, adopted *in toto* the findings, conclusions, and recommendations of the Trial Examiner [R. 64], with but a single reversal on one point alone. [R. 64.]

The Board agreed with the Trial Examiner's findings that Petitioner did not promise benefits to employees if they refrained from union or other concerted activities, that Petitioner did not threaten reprisals to employees if they engaged in union or other concerted activities, that Petitioner did not coercively interrogate employees, that Petitioner did not create the impression of having engaged in surveillance of employees' union or other concerted activities, that Petitioner did not grant a premium wage rate in order to interfere with, restrain or coerce employees, and that Petitioner did not discharge Nhoon Reese because of his union sympathies. [R. 64.]

The Board, however, reversed the Trial Examiner on one point; although the Board adopted the Trial Examiner's finding that Nhoon Reese was not discharged because of his union sympathies (and thus there was no 8(a)(3) violation), the Board found that Reese was discharged for engaging in protected concerted activity to secure increased wage benefits, and thus there was an 8(a)(1) violation. [R. 64, 68, 69.]

It is from the Board's reversal of the Trial Examiner on this one point that Petitioner seeks review, and respectfully asks this Court to set aside that portion of

the Board's decision and to deny enforcement of the Board's order.

2. The Facts.

Petitioner Falcon Plastics is a division of B-D Laboratories, Inc., which is wholly owned by Becton-Dickinson & Company, one of the oldest manufacturers of medical products in the United States. [T. 158:13-16.] Falcon Plastics makes medical products, primarily for use in the laboratory. [T. 155:14-18.]. The quality of products is extremely important [T. 158:24-160:6; 186:24-190:25] and the standards to which Petitioner manufactures are higher than Federal standards. [T. 159:2-13.]

As found by the Trial Examiner, Petitioner "stresses the need for high quality control, stricter than the requirements imposed by the Food and Drug Administration and other government agencies, not only from the standpoint of health and safety but also from that of its pride in reputation of its products. The parent company maintains Biological Safety and Quality Control Committees which audit Respondent [Petitioner] as to both aspects of this production and Respondent [Petitioner] itself maintains detailed quality production control records." [R. 21:44-51.]

Because the quality of Petitioner's medical products is so critical, Petitioner places extreme importance upon the attitude of its employees, particularly toward supervisors. [T. 159:6-160:16.] As expressly quoted by the Trial Examiner, Petitioner's personnel manual pro-

vides penalties ranging from reprimand to immediate discharge for various rule violations, including insubordination and poor attitude. [R. 39:38-40:13; see also, T. 410:4-412:21; 418:16-419:7.]

The personnel manual also provides that the degree of penalty for a violation depends on “the seriousness of the offense in the judgment of management.” [R. 39:47-48.]

On March 30, 1966, Byrd, Nhoon Reese’s foreman [R. 23:2], told Reese that Reese was to receive a 10¢ per hour merit increase; Reese told Byrd that Petitioner could “shove it up their butt” or “stick it up their ass.” [R. 33:43-35:10.] Reese was discharged on April 4, 1966. [R. 35:16-36:12.]

All testimony, including Reese’s own, is an agreement that when he was offered the merit increase he told foreman Byrd that Petitioner could “shove it up their butt” or “stick it up their ass.” [Reese, T. 86: 8-10; 89: 9-12; 576:21-23; Horn, T. 279:20-280:11; Farkas, T. 378:2-7; Lux, T. 435:21-436:2; 441:14-18; Byrd, T. 544:15-18.]

Byrd testified that he was mad enough to fire Reese on the spot, and didn’t do so only because he wasn’t sure that he had the authority. [T. 556:7-557:18; 559:1-14.] Management was unanimous that they considered Reese to be insubordinate and that this was the sole reason for Reese’s discharge. [Horn, T. 292:23-293:21; 295:6-12; Farkas, T. 384:11-14; Lux, T. 450:24-451:3; 481:1-4; 502:22-506:2; Byrd T.

548:8-549:15.] As mentioned above, the penalty of discharge was consistent with the personnel manual, and the manual is given to all of Petitioner's employees. [T. 408:2-7.]

The Trial Examiner specifically found that "Reese's behavior and attitude toward Supervisor Byrd, and the language with which he underscored his disgruntlement about the proffered merit increase, undoubtedly provided cause for discharge." [R. 38:40-42.]

There was no manifestation by Petitioner of opposition to the union or to the self-organizational rights of the employees [R. 29:45-47], no anti-union animus, hostility, or other misconduct on the part of Petitioner [R. 29:53-30:3], and "there is a total absence of evidence of anti-union animus, hostility or opposition to the Union, or of the commission of unfair labor practices by Respondent [Petitioner]" [R. 40:33-35].

The Trial Examiner categorically rejected certain of the testimony of the alleged discriminatee, Nhoon Reese, and found that, judged by Reese's own testimony and his attitude and demeanor on the witness stand [R. 24:43-44], such testimony was "singularly unconvincing" [R. 24:45], imposed "a serious strain on one's credulity" [R. 26:10-14], was "so palpably contrived to furnish a basis for his claim of discriminatory treatment, as to be unworthy of belief" [R. 26:26-29], and that "perhaps the most charitable thing to be said for Reese's testimony is that it was a case of 'the wish being mother to the thought'". [R. 26:29-31.]

3. Questions Involved.

a. Can the Board, relying upon non-existent facts and drawing unsupported inferences, substitute its findings for those of the Trial Examiner that there was cause for Reese's discharge, and erroneously find that Reese's discharge was unlawful?

b. Can the Board, relying upon non-existent facts and drawing unsupported inferences, substitute its judgment for that of Petitioner that there was cause for Reese's discharge, and erroneously find that Reese's discharge was unlawful?

4. Specification of Errors.

Insofar as the Board's Decision and Order finds and concludes that Petitioner violated the National Labor Relations Act, as amended, by discharging Nhoon Reese, and orders Petitioner to take certain action as a result thereof, it is contrary to law and to the Act, contrary to the evidence, and is not supported by substantial evidence considering the record as a whole.

ARGUMENT.

1. The Board's Finding That Nhoon Reese Was Discriminatorily Discharged Is Contrary to the Evidence and Is Based Upon Unsupported Inferences Which the Board Has Created From Non-Existent Facts.

The Board agrees with Petitioner and the Trial Examiner at least to the extent that in some circumstances Reese's language "might be regarded as so offensive in character as not to be condoned" [R. 66], "but", says the Board, "the true character of such mode of expression must be evaluated not in the abstract but in the context of the surroundings in which it occurs." [R. 66.]

However, the "context" in which the Board then proceeds to "evaluate" Reese's conduct is plucked by the Board from blue-sky, for such "context" is not found in the facts of this case. The major reasons given by the Board for its erroneous reversal of the Trial Examiner simply do not square with the actuality of the record, and owe their existence solely to the imagination of the Board:

a. Board's erroneous statement: "In this case there is evidence that such language was commonly used by employees at this plant in their work-a-day associations." [R. 66.]

Actuality: There is no such evidence. The only testimony on the subject of common usage at the plant of such language is that of foreman Byrd, to whom Reese made his insubordinate statement, and Byrd's testimony is directly contrary to the Board's assertion. Byrd testified that the language

cannot be classed as shop talk and that he, Byrd, had not heard it used. [T. 551:24-552:7.]

b. Board's erroneous statement: "Further, Reese made the remark to a supervisor with whom a personal relationship existed." [R. 66.]

Actuality: At best, this statement by the Board is a misleading exaggeration of the testimony; at worst, it is without support in the testimony. The only testimony which even relates to this point is that of Byrd, who testified that he had gone fishing with Reese twice, and that Reese did not use words such as "ass" on these fishing trips. [T. 551:11-552:1.] The record contains no description of these fishing trips; there is nothing in the record to support the inference that the fishing trips involved a "personal" relationship; and there is no other evidence of any kind that a "personal" relationship existed.

c. Board's erroneous statement: "Byrd admitted that he was not offended or outraged by the remark and that he did not regard it as a personal affront." [R. 66.]

Actuality: Byrd made no such admission. To the contrary, he testified that he was mad enough to have fired Reese on the spot, if he had known that he had had the authority to do so. [T. 556:7-16; 557:9-18; 559:3-14.]

d. Board's erroneous statement. "It also appears from the evidence that Reese was subjected to disparate treatment." [R. 66.]

Actuality: Not so; no other employee told Petitioner to "shove it up their butt" or "stick it up their ass."

e. Board's erroneous statement: "Respondent [Petitioner] offers no reason why the harshest penalty was imposed on Reese when the personnel manual quoted in relevant part by the Trial Examiner provided for punishment of lesser magnitude." [R. 67.]

Actuality: This statement by the Board is in error on two counts: (1) Lux, the supervisor who made the actual decision to discharge Reese [T. 292:15-18; 441:8-442:16; 480:17-481:6], in response to questions by the Trial Examiner, fully explained why he elected to discharge Reese rather than to invoke lesser discipline [T. 504:14-506:2], and (2) the personnel manual, quoted by the Trial Examiner, did not "provide" for lesser penalty, but for alternative penalties, *including* immediate discharge "depending on the seriousness of the offense in the judgment of management." [R. 39:38-40:18.]

f. Board's erroneous statement: "Its [Petitioner's] asserted reason [for Reese's discharge] does not withstand scrutiny in light of the customary usage of such language at the plant, the disparate treatment accorded Reese, the provisions of the personnel manual, the failure to explain the imposition of the harshest punishment, . . ." [R. 68.]

Actuality: Error, as shown above.

g. Board's erroneous statement: "Based upon the above facts, and the conclusions drawn therefrom by the Trial Examiner, as well as Respondent's [Petitioner's] failure to take exceptions thereto and its apparent acceptance of these conclusions,

we do not view Reese's discharge as simply an exercise of an employer's inherent management right to discipline recalcitrant employees." [R. 65-66.]

Actuality: Strange indeed that the Board should base its reversal of the Trial Examiner in part upon Petitioner's "failure" to except to the Trial Examiner's decision, which was 100% in favor of Petitioner and which recommended "that the complaint be dismissed in its entirety." [R. 41:27-28.] For the Board to say that a successful litigant must appeal from a 100% favorable decision or else his "failure" to do so will be a ground for reversal, is a novel theory and a unique foundation for the Board's creation of an otherwise unsupported inference.

Since the Board has relied so heavily upon the foregoing non-existent facts or unfounded inferences in reversing the Trial Examiner, it follows that the Board's decision cannot stand.

Petitioner's motivation, intent or reason for discharging Reese is a question of fact (*NLRB v. Stafford*, 206 F. 2d 19, 22, 23 (8 Cir. 1953)), and the Trial Examiner found as facts that Reese's behavior and attitude toward his supervisor undoubtedly provided cause for discharge [R. 38:40-42] and that he was not discharged for an unlawful reason [R. 41:22-28].

Only the Trial Examiner can fully evaluate credibility (*NLRB v. Park Edge Sheridan Meats, Inc.*, 341 F. 2d 725, 728 (2 Cir. 1965)) and the findings of the Trial Examiner have particular significance where material facts depend on the determination of the credibil-

ity of witnesses. (*Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496, 95 L. ed. 456, 471, 71 S. Ct. 456 (1951).)

The unanimous sworn testimony of Petitioner's witnesses that Reese was discharged solely because of his insubordinate statement cannot be disregarded, as the Board disregarded it [R. 67], merely because of a suspicion that the witnesses may have lied; there must be something more, something more than is found in the record in the present case: there must be impeachment or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point. (*Lozano Enterprises v. NLRB*, 357 F. 2d 500, 502 (9 Cir. 1966); *NLRB v. Stafford, supra*, 206 F. 2d at 23.)

Where, as here found by the Trial Examiner, the employer's explanation of the motivation for a discharge is a reasonable one, the onus is upon the Board to establish the falsity of the explanation and the truth of its own interpretation (*NLRB v. United Brass Works, Inc.*, 287 F. 2d 689, 693 (4 Cir. 1961)), but the Board cannot do this, as it has done here, by creating inferences where there is no substantial evidence upon which these may be based. (*NLRB v. Sebastopol Apple Growers Union*, 269 F. 2d 705, 711 (9 Cir. 1959).)

When the Board's erroneous assertions in this case of non-existent facts are, as they should be, purged from consideration, the most that can be said is that there is perhaps a scintilla of evidence in support of the Board's reversal of the Trial Examiner; this of course, does not suffice. (*Herb Stein, Inc. v. NLRB*, 368 F. 2d 556, 558 (6 Cir. 1966).)

Accordingly, since there is no substantial basis in the record for the Board's reversal of the Trial Examiner, and since the Board's reversal of the Trial Examiner is based upon asserted facts which either do not exist or actually are contrary to the record, or upon the creation of inferences that have no support, the Board's reversal of the Trial Examiner should be set aside and the Board's order denied enforcement.

Furthermore, there is another reason to set aside the Board's decision and to deny enforcement.

2. The Board's Finding That Nhoon Reese Was Discriminatorily Discharged Is Based on the Board's Frequent Error of Substituting Its Judgment for That of Management.

Discharge of employees is a normal, lawful legitimate exercise of the prerogative of free management in a free society; an unlawful purpose is not lightly to be inferred, and in the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one. (*Lozano Enterprises v. NLRB*, *supra*, 357 F. 2d at 503; *NLRB v. Sebastopol Apple Growers Union*, *supra*, 269 F. 2d at 713; *NLRB v. McGahey*, 233 F. 2d 406, 413 (5 Cir. 1956).)

Even if it be assumed, contrary to fact, that the reasons given by the Board for reversing the Trial Examiner were based upon substantial evidence, it still is error for the Board to reverse the Trial Examiner:

“ ‘The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was ex-

cessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids. . . .”

Losano Enterprises v. NLRB, 357 F. 2d 500, 503 (9 Cir. 1966);

NLRB v. Sebastopol Apple Growers Union, 269 F. 2d 705, 713 (9 Cir. 1959);

Fort Smith Broadcasting Company v. NLRB, 341 F. 2d 874, 879 (8 Cir. 1965);

Steel Industries, Incorporated v. NLRB, 325 F. 2d 173, 177 (7 Cir. 1963);

Portable Electric Tools, Inc. v. NLRB, 309 F. 2d 423, 426 (7 Cir. 1962);

Schwob Manufacturing Co. v. NLRB, 297 F. 2d 864, 870 (5 Cir. 1962);

NLRB v. McGahey, 233 F. 2d 406, 412-413 (5 Cir. 1956).

Conclusion.

The National Labor Relations Act, as amended, provides that no order of the Board shall require the reinstatement of any individual, or the payment to him of any back pay, if he was discharged for cause. (29 U.S.C.A. §160(c).)

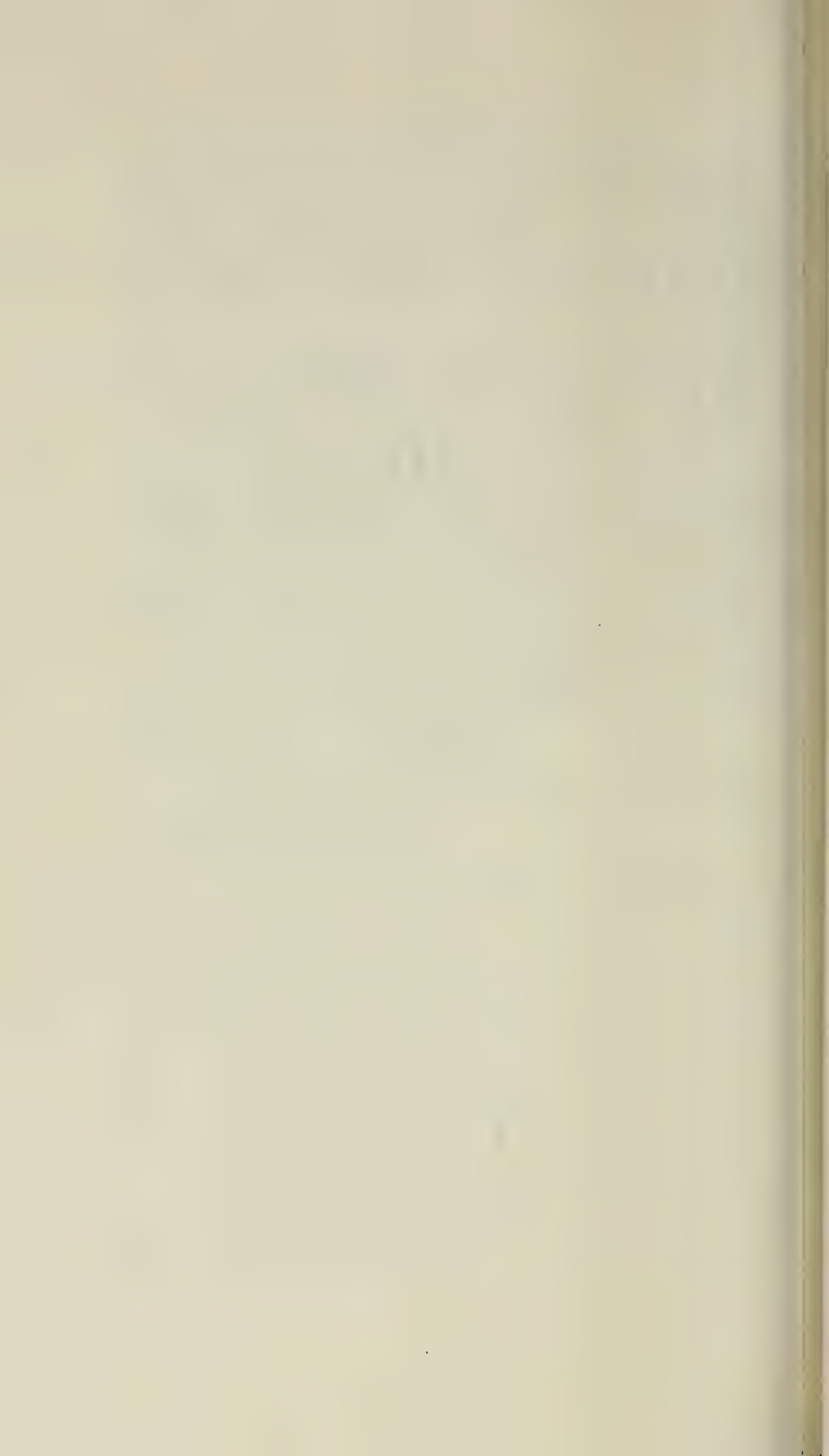
Here, the Trial Examiner specifically found that Reese was discharged for cause. [R. 38:40-42.]

Here, the Board reversed the Trial Examiner based on non-existent facts and unsupported inferences, coupled with the "frequent error" specifically condemned by the Fifth, Seventh, Eighth and Ninth Circuits.

For these reasons, the Board's decision and order should be set aside, and enforcement denied.

Respectfully submitted,

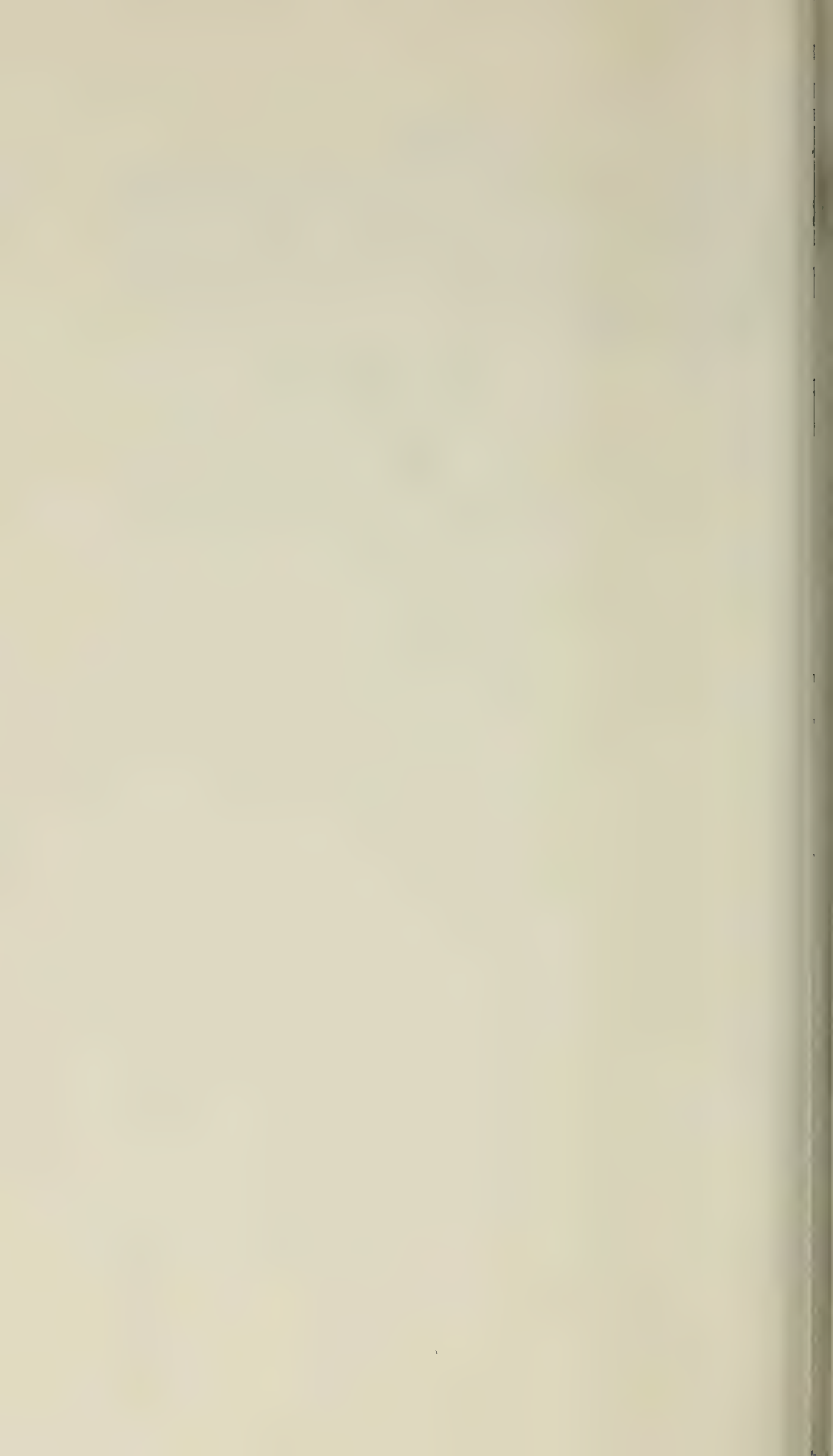
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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK SIMPSON



United States Court of Appeals

FOR THE NINTH CIRCUIT

FALCON PLASTICS — DIVISION OF
B-D LABORATORIES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review and
Cross-Petition for Enforcement of
an Order of
the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

FILED

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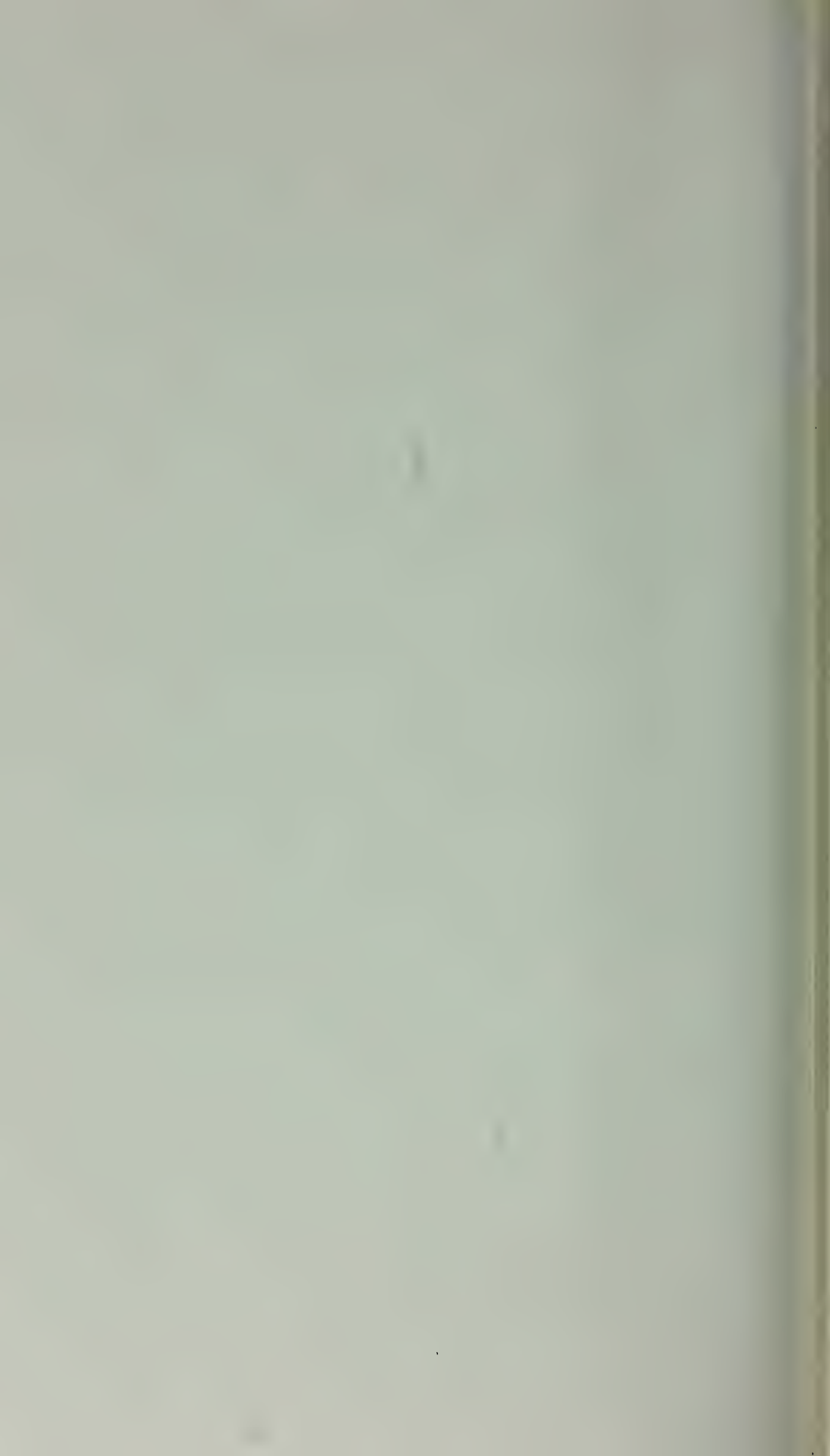
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ited States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,882

FALCON PLASTICS — DIVISION OF
B—D LABORATORIES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review and
Cross-Petition for Enforcement of
an Order of
the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Falcon
Plastics — Division of B—D Laboratories, Inc. (hereafter, the
Company), to review and set aside an order of the National
Labor Relations Board issued May 19, 1967. In its answer the
Board has requested enforcement of its order. The Board's

decision and order (R. 19-41)¹ are reported at 164 NLRB No. 101. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*),² the unfair labor practice having occurred at Los Angeles, California, where the Company is engaged in the manufacture of disposable plastic medical and laboratory products. No jurisdictional issue is presented.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by discharging employee Nhoon Reese in order to discourage the protected concerted activity in which he and two other employees participated. The evidence on which this finding was based is summarized below.

A. Background

The Company manufactures about 60 items for medical and laboratory use, including pipets, a narrow plastic tube tapered at one end and internally calibrated in milliliters (R. 21; Tr. 156-157; P. Exh. 12). The pipets are produced by an

¹ References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. References designated "G.C. Exh." and "P. Exh." are to the exhibits of the General Counsel and Petitioner, respectively.

² The pertinent statutory provisions are reprinted in Appendix A, *infra*, page A-1.

extrusion process in the Company's injection molding and extrusion department, which is under the general supervision of Rudy Lux. About 50 employees work in the department under Shirl Brayton, the administrative supervisor, and 3 other immediate supervisors. (R. 21, 22; Tr. 459, 507).³ At the time in question here, one extrusion operator on each shift produced pipets (R. 21; Tr. 462-463).

B. The concerted activity

In March 1966,⁴ Lux met with the three extrusion operators (Nhoon Reese, Governor ("Bootsie") Reese, and Horace Powell) and the extrusion department supervisors (R. 33; Tr. 111, 303, 430-431).⁵ Lux informed them that the Company had purchased a new extrusion machine to produce pipets, that they would need further instruction, and that the new machines would require more work (R. 33; Tr. 110-112; 304-305, 429-431).

After meeting with Lux, the operators met alone and discussed the new development. "Bootsie" Reese stated that although they had been assigned new responsibilities, nothing had been said about a commensurate pay increase. As a result of their discussion, the operators decided that they would accept nothing less than a 25 cent an hour increase. (R. 33; Tr. 112-113, 305-306).

³ Altogether, the Company employs about 225 production and maintenance employees (R. 21; Tr. 223).

⁴ All dates refer to 1966 unless otherwise noted.

⁵ For 3 days prior to the meeting, all of the operators had been working the day shift (R. 33; Tr. 304).

C. The Company offers merit
increases to the employees

Near the end of March, the Company began its semi-annual merit rating of employees. Those who had performed well during the prior six months were offered increases (R. 33; Tr. 375-376). On March 30, Powell was offered a 15-cent merit increase by his foreman, Brayton. Powell, as he had agreed to do, refused the increase. He told Brayton that he would rather continue at the old rate and have the 15 cents added to his next raise so that he would feel then that he was receiving a more adequate increase. (R. 34, 36; Tr. 114-116, 515-517). Brayton expressed surprise and lack of comprehension of the refusal and suggested that they discuss the matter with Lux when he returned to work (R. 36-37; Tr. 115, 516, 517).

That evening while the shifts were changing, Powell told Nhoon Reese, who had just arrived for the second shift, that he had turned down the merit increase. He advised Reese to do the same but to be polite and to tell his supervisor that he would rather have the increase added to his next raise (R. 33-34; Tr. 86-87, 117-118, 569).

Shortly before the end of his shift, Reese's supervisor, Byrd, offered him a ten-cent merit increase. Reese refused to accept the raise, telling Byrd that he felt the amount was inadequate. When Byrd said that the raise amounted to \$10.00 a week, Reese retorted that it was "short of \$10.00 by about \$6.00" and if that was all the Company could offer, it could take the raise and "shove it up their butt" (R. 35; Tr. 83-86, 542-545). Byrd asked Reese if he wanted the answer noted on the merit increase form. Reese responded in the negative and told Byrd that he only wanted the report to reflect that he desired the increase to be

included with his next raise (R. 35; Tr. 86, 577). The next day, when Brayton asked Byrd whether he had completed his merit ratings, Byrd told Brayton about the Reese incident (R. 35; Tr. 513-514, 545).

During the third shift on April 4, "Bootsie" Reese was given his merit review. He also protested that the amount was inadequate to compensate him for his added duties. However, "Bootsie's" supervisor explained that the merit raise was based on past performance and that when the new machine went into full production the wage scale would be reviewed. When these qualifications were explained, "Bootsie" accepted the increase. (R. 37, 67; Tr. 306-308).

D. Nhoon Reese's discharge

Lux returned to the plant on April 4 and was immediately informed by Brayton and Supervisor Deeds of the incidents involving Reese and Powell (R. 35; Tr. 435-436).⁶ Lux told them that he would wait until Byrd came to work and would discuss the matter with him (R. 35; Tr. 437, 482). Lux then reported the incident to Horn, the Company's general manager. Horn made no recommendation regarding disciplinary action (R. 35; Tr. 279-280, 437, 483-484).

Lux next summoned Powell to his office and questioned him about his rejection of the raise (R. 37; Tr. 115). Powell explained that he did not feel the raise was adequate to compensate him for the extra work on the new machine and again requested that it be added to his next raise. Lux explained, however, that the raise was only in recognition

⁶ "Bootsie" Reese's interview was not conducted until that evening.

of past performance and that it would not affect future increases. Powell then apologized "for causing this confusion," accepted the raise and thanked Lux (R. 37; Tr. 116, 433-444, 517). Lux then asked Powell "What am I working back there, a family" and added that Nhoon Reese had "come up with somewhat the same thing" when offered his increase (R. 37; 116). Powell disavowed any connection with Reese, and when Lux mentioned the incident involving Reese, Powell said that though he (Powell) had refused the raise, he had acted in "a nice way" and without getting out of line (R. 37; Tr. 116-117). Lux stated that he had not yet decided what to do with Nhoon Reese (R. 37; Tr. 117).

When Byrd arrived, Lux and Brayton discussed Reese's refusal to accept the raise with him. Lux asked Byrd whether he was in the habit of letting his subordinates talk to him that way. Though Byrd was not offended by the remark and did not consider it a personal attack (R. 39; Tr. 552), he told Lux that Reese's actions warranted discharge and that he had been "mad enough [to] have fired [Reese] on the spot" (R. 35; Tr. 556). He explained that he did not fire Reese because he was so taken aback by the comment that he decided to wait for Lux's return and because he was not sure whether he had the authority to discharge a subordinate (R. 35; Tr. 439, 486, 547).

Lux then summoned Reese to his office and questioned him about the remark. Reese admitted making it and apologized. Lux told him that the apology did not excuse his behavior toward a supervisor, and Reese again apologized. Finally, Lux said the Company could not tolerate such behavior and he had no alternative but to discharge him. Reese again apologized and asked Lux to reconsider but Lux said that the employees could not get the idea that they could

speak to supervisors in that manner (R. 35; Tr. 88-90, 440-442, 547-549).⁷

II. THE BOARD'S CONCLUSION AND ORDER

Based on these facts, the Board found, contrary to the Trial Examiner, that the Company violated Section 8(a)(1) of the Act by discharging Nhoon Reese for engaging in protected activity in concert with the two other extrusion operators.⁸

The Board's order requires the Company to cease and desist from the unfair labor practice found, and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of their right to self-

⁷ The Company's personnel manual, which all employees received, provides for disciplinary action ranging from reprimand to discharge for "insubordination," and for a written warning, disciplinary lay-off, or discharge for employee "misconduct" (R. 39-40; Tr. 410-414). "Misconduct" included "insubordination" (R. 40; Tr. 410-414). Another rule, providing for the same penalties, covered "obscene or immoral practices" but the Company admitted that Reese was not discharged pursuant to the latter rule (R. 40; Tr. 417).

⁸ In reversing the Trial Examiner, the Board did not disturb his findings of fact or credibility findings, but merely drew different conclusions from those findings. Under such circumstances, the Trial Examiner's contrary conclusions are not entitled to special weight. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 494, 496; *N.L.R.B. v. Texas Independent Oil Co.*, 232 F. 2d 447, 451 (C.A. 9); *Cheney California Lumber Co. v. N.L.R.B.*, 319 F. 2d 375, 377 (C.A. 9).

The Board affirmed the Trial Examiner's dismissal of other Section 8(a)(1) allegations as well as the allegation that Nhoon Reese's discharge violated Section 8(a)(3) of the Act.

organization. Affirmatively, the Board ordered the Company to reinstate Nhoon Reese, to make him whole for any loss he may have suffered, and to post the appropriate notice.

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING NHOON REESE BECAUSE OF HIS PROTECTED CONCERTED ACTIVITIES.

It is clear that Nhoon Reese was engaged in protected concerted activity when he and the two other extrusion operators decided to seek a twenty-five-cent an hour wage increase to compensate them for the additional work entailed by the installation of a new extrusion machine. See, e.g., *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9; *N.L.R.B. v. McCatron*, 216 F. 2d 212 (C.A. 9), cert. denied, 348 U.S. 943; *N.L.R.B. v. Globe Wireless, Ltd.*, 193 F. 2d 748 (C.A. 9); *N.L.R.B. v. Phaostron Instrument & Electronic Co.*, 344 F. 2d 855, 858-859 (C.A. 9); *Pacific Electricord Co.*, 153 NLRB 521, enforced *per curiam* 361 F. 2d 310 (C.A. 9). Nor can there be any doubt of the Company's knowledge that the employees were engaged in such concerted activities at the time it discharged Reese. Prior to Reese's discharge, both he and Powell rejected the tendered merit increase for the same reasons and, as they had agreed, both requested that the money be added to their next raise so they would feel they were then receiving an adequate increase (R. 33-34, 36-37; Tr. 114-116, 515-517, 83-86, 542-545, 577). Further, Brayton advised Lux of these facts (R. 35, 36-39; Tr. 435-436), and Lux admitted his knowledge of the concerted activity by asking Powell "What [he was]

working back there, a family” because he and Nhoon Reese had “come up with somewhat the same thing” with regard to the increase (R. 66, 37; Tr. 98, 116).⁹ Based on these facts, both the Board and the Trial Examiner found that the Company knew of the concerted activity (R. 66, 38). Thus, the only remaining question is whether Nhoon Reese was unlawfully discharged because of this activity or whether, as the Company contends, he was discharged because his remark to Byrd was insubordinate. As we show below, the Board’s finding that the discharge resulted from the concerted activity is supported by substantial evidence.¹⁰

The language used by Reese in rejecting the merit increase must be judged in the context in which it occurred. See *Butcher Boy Refrigerator Door Company, Inc.*, 127 NLRB 1360, 1371, enf’d 290 F. 2d 22 (C.A. 7). As the Board found, Reese and Byrd maintained a personal friendship outside the plant (R. 66, 38; Tr. 551-552), and Reese’s remark, though impulsive and coarse, was not intended as a challenge to the Company’s authority. Rather, it was a remark made to a person Reese considered a friend and was

⁹ Although the three extrusion operators were in fact related, it is clear that, as the Trial Examiner found, this was not the sense in which the remark was meant (R. 39, fn. 39).

¹⁰ Petitioner’s assertion (Br. p. 12) that the Board is bound by the unanimous sworn testimony of Petitioner’s witnesses that Reese was discharged solely because of his insubordinate conduct” is contrary to settled law. “Even were the employer’s evidence uncontradicted as to his motive behind any certain action, the Board may, but need not, accept it.” *N.L.R.B. v. Mrak Coal Company, Inc.*, 322 F. 2d 311, 313 (C.A. 9); accord, *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F. 2d 466, 470 (C.A. 9); *Great Atlantic & Pacific Tea Co. v. N.L.R.B.*, 354 F. 2d 707, 709 (C.A. 5).

expressive of Reese's anger at not receiving what he and his co-workers considered an adequate increase (Tr. 573). The remark was not made in the presence of other people, was not directed at Byrd or anyone else personally but at the Company generally, and was couched in language not at all uncommon among industrial employees.¹¹ At worst, the remark was, in context, no more offensive than that involved in *N.L.R.B. v. Thor Power Tool Co.*, 351 F. 2d 584 (C.A. 7) where an employee-grievance committeeman, in the course of a heated grievance meeting, referred to one of the company officials present as a "horse's ass." The Seventh Circuit upheld the Board's finding that the discharge of the employee for making this remark violated Section 8(a)(1) of the Act. The court noted that while flagrant misconduct during the course of Section 7 activity does not immunize the actor against disciplinary action,

"not every impropriety committed during such activity places the employee beyond the protective shield of the act. The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. [citation omitted] Initially, the

¹¹ As the Supreme Court has noted, "Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58, and see the dissenting opinions of Mr. Justice Black (at pp. 67-68) and Mr. Justice Fortas (at p. 70); see also, *Butcher Boy Refrigerator Door Company, Inc.*, *supra*, 127 NLRB at 1371: "We are not here concerned with a living room or parlor discussion The incident arose in the shop, in an extremely tense atmosphere, and was heard by an audience of men. . . ."

responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not to be disturbed. In the instant case, we cannot say that the Board's conclusion that [the employee's] remark was within the protection of section 7 was either unreasonable or capricious."

351 F. 2d at 587.

Nor did Reese intend the remark to go beyond Byrd, for when Byrd asked Reese whether he wanted the report to reflect the remark, Reese told Byrd that he should only report that he wanted the raise added to his next raise so he would feel he was receiving an appreciable increase (R. 66, 35; Tr. 86, 576-577). Further, Byrd himself testified that he was generally not at all shocked by the use of some coarse language and that, by the day after the incident, he again engaged in personal conversation with Reese (R. 66, 39; Tr. 552, 557).¹²

¹² The Company argues that Byrd was so angered by the remark that he wanted to fire Reese on the spot (Br. p. 9). However, it is clear from the record that only when Lux confronted Byrd by asking him whether he was in the habit of allowing his employees to speak to him in that manner, did Byrd say that he was angry enough to have fired Reese on the spot (R. 35; Tr. 486). Byrd's excuses to Lux for not having taken action himself were that he was so taken aback that he decided to wait for Lux to return and that he did not know he had the authority to fire employees under his supervision (R. 35; Tr. 439, 486). But even if Byrd were angered by Reese, Byrd's comments at the time indicate that his anger was due to his inability to understand the refusal of the raise and not with the language used to reject it (R. 39; Tr. 86).

In drawing the inference that Reese was discharged for his concerted activity, and not because of his remark to Byrd, the Board also relied on the fact that Reese was punished by the most severe penalty available to the Company. The Company's personnel manual¹³ provided for punishment for insubordinate behavior ranging from a reprimand to discharge. It also provided for a system of multiple warnings (Tr. 412) and for clearing an employee's record when he was subjected to no disciplinary action for six months. Yet Reese was discharged when, for the first time in three years, he acted in a way which the Company now contends was insubordinate. Not only was this the first problem of this type which Reese encountered (R. 40; Tr. 68), but there is no showing that other employees had ever been discharged for using similar language. Moreover, Reese was considered a good employee during his entire tenure (R. 67, 32; Tr. 454);¹⁴ he had made money-saving suggestions for solving problems the Company encountered with the machine on which he worked (R. 32, 67; Tr. 456-458); at the time of his discharge Reese was being considered for a supervisory position (R. 35; Tr. 89); and the Company's personnel manager testified that the Company was having

¹³ Quoted in relevant part at R. 39-40.

¹⁴ Though Reese's production fell below standard for a short time during January 1966, this was admittedly not a consideration at the time of his discharge (R. 32, 67; Tr. 590-591). Further, his production had improved markedly since then and he was offered a merit increase in March (R. 32; Tr. 453-454) in the same amount as that offered "Bootsie" Reese, whom the Company considered an "excellent" employee (Tr. 308).

trouble retaining skilled employees (R. 67, 28; Tr. 350, 354, 387, 398-399).¹⁵ In these circumstances, the Company's asserted explanation for imposing the harshest penalty available to it rather than some lesser penalty¹⁶ — particularly since no one else had heard the conversation between Reese and Byrd and Reese apologized for his remark on numerous occasions — could properly have been rejected by the Board. For "there was nothing in the nature of the misconduct that warranted such extraordinary action" (*Aeronca Mfg. Co. v. N.L.R.B.*, 385 F. 2d 724, 728 (C.A. 9)), and the Board properly considered the severity of the punishment as one of the factors supporting its conclusion herein.¹⁷

Indeed, the Company's treatment of Reese, even as compared to its treatment of the other two extrusion operators who also rejected the raise, compellingly shows that its real motive for discharging him was the strength with which he rejected the proffered raise and thereby underlined the

¹⁵ This testimony was the basis of the Board's dismissal of an 8(a)(1) allegation based upon a wage increase offered during a union organizing campaign (R. 28).

¹⁶ Lux testified that he had "a responsibility to management and to the company * * * [to] maintain order and discipline of the employees" (Tr. 505) and that he did not consider Reese's apologies to be sufficient to mitigate the alleged seriousness of the offense (Tr. 506).

¹⁷ We do not dispute petitioner's assertion that the Board ought not to substitute its judgment for management's (pet. br. pp. 13-14). But the Board has not done so here. Rather, it has merely balanced, as one of the factors bearing on petitioner's motivation, the nature of Reese's offense and the severity of the punishment meted out for it. *Aeronca, supra*; *N.L.R.B. v. Sebastopol Apple Growers Union*, 269 F. 2d 705, 710 (C.A. 9); *N.L.R.B. v. Cousins Associates, Inc.*, 283 F. 2d 242, 243 (C.A. 2).

unwelcome fact that his refusal was intended to effectuate an anticipated demand for higher wages. The Company states that it did not discharge Reese merely because he used coarse language (R. 39; Tr. 553). Yet the use of such language marks the only difference between Nhoon Reese's refusal to accept the increase (whereupon he was discharged without being tendered any explanation of the purpose of the increase) and the otherwise identical refusals of Powell and "Bootsie" Reese (to which the Company reacted by explaining that purpose in order to induce them, as it did, to accept the increase). Thus, at the time of the discharge Lux was aware that both Nhoon Reese and Powell had refused the increase for the same reasons (*supra*, p. 6).¹⁸ But when Lux spoke to Powell about the matter, he explained the purpose of the increase, assured Powell that it would not affect any later wage evaluations based on new responsibilities, accepted Powell's apology for "causing this confusion," and allowed him to change his mind and accept the increase (R. 37; Tr. 116, 433, 517).¹⁹ However, in his later interview with Reese, Lux never explained this distinction, never gave Reese a chance to change his mind, and refused to accept Reese's numerous and apparently sincere apologies. Rather, he told Reese that apologies did not excuse his actions toward his supervisor, that the Company could not tolerate such behavior, that he had no choice but

¹⁸ "Bootsie" Reese's merit interview occurred after Nhoon Reese's discharge (R. 37, 67; Tr. 306).

¹⁹ Bootsie Reese's merit review was conducted in a similar manner. Thus, when Bootsie Reese refused to accept the raise, he was told that it was in recognition of past performance and would not affect any future increase based on new responsibilities (R. 37, 67; Tr. 307-308).

to discharge him, and that employees could not be permitted to gain the notion that they could speak to supervisors in that manner (R. 35; Tr. 88-90, 441-442, 548, 549). Nor was Lux moved by Reese's protestation that he made the remark to Byrd because he had considered Byrd a friend and thought the remark would be held in confidence (R. 36; Tr. 88-89). When Reese appealed to Byrd to explain this to Lux, Byrd said he was sorry, but he had already reported the incident (R. 36; Tr. 88-90). The Company, then, discharged a skilled and highly regarded employee while retaining the two other employees who acted in a similar manner. This, when coupled with the other circumstances of the case, provided ample basis for the Board's finding that since Powell and "Bootsie" Reese only accepted the increase after being assured that it was based on past performance, "what really disturbed Lux was his concern about the concerted action of the employees in rejecting the merit increase and the realization that the rejection presaged a demand for higher wages" (R. 67), and that the discharge was intended "to foreclose such concerted activity in the future." (R. 68).

CONCLUSION

For the reasons stated above, we respectfully submit that the petition for review should be denied and that a decree should issue enforcing the Board's order in full.

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Attorneys,
National Labor Relations Board.

February 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid of protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified,

or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified

by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *

B-1

APPENDIX B

Index to Reporter's Transcript

(Numbers are to pages of
reporter's transcript)

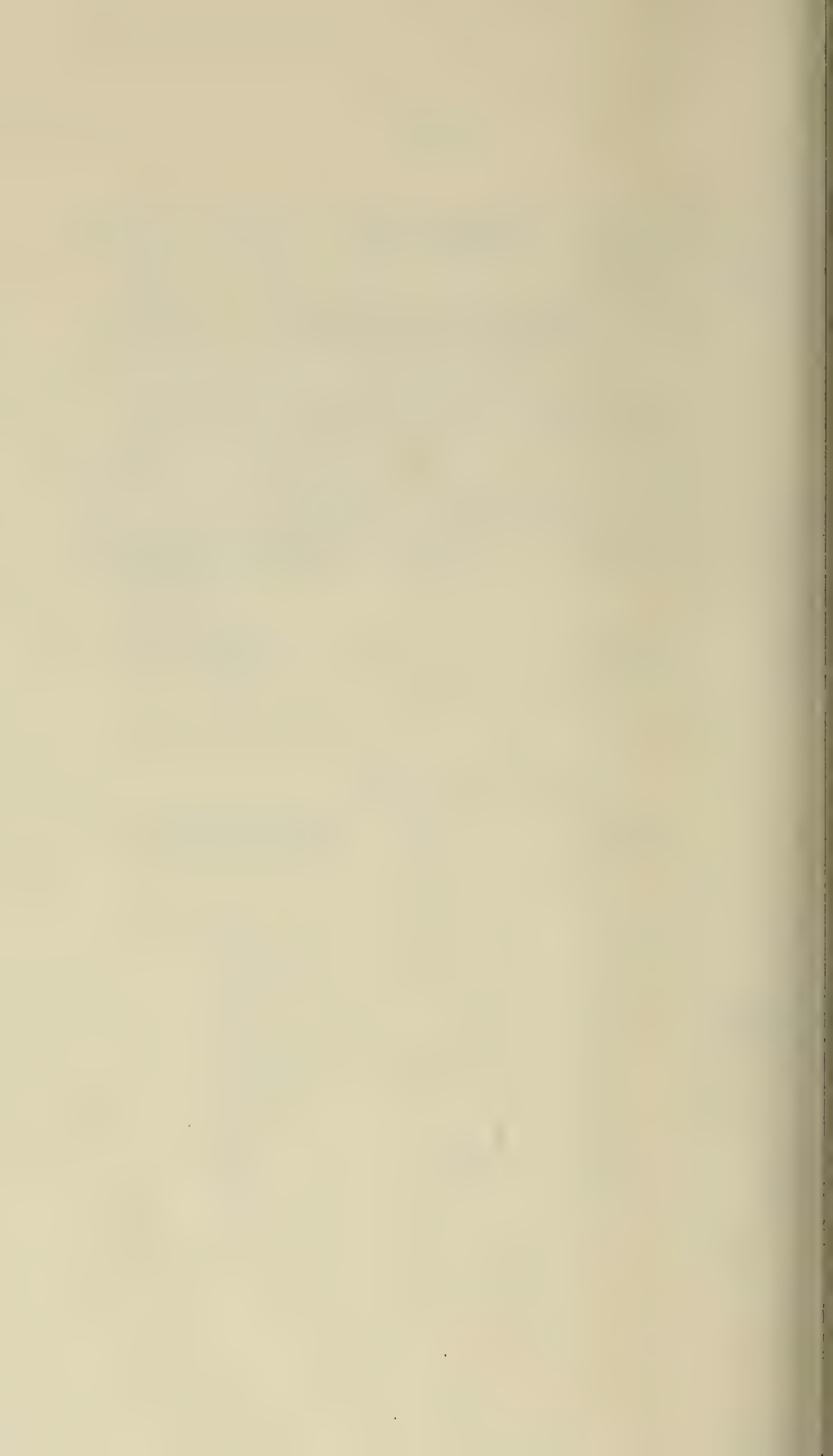
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GENERAL COUNSEL'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>
1(a)-1(f)	6	6	6
2	31	58	60-61
3	55-56	—	403 (rejected)
4	108	—	—
5	474	—	—

RESPONDENT'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>
1	10	10	16
2	—	43	52
3	107	107	108
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12	—	581	581
13	581	582	582



No. 21,882

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FALCON PLASTICS—DIVISION OF B-D LABORATORIES,
INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside Decision and Order of
The National Labor Relations Board.

PETITIONER'S REPLY BRIEF.

SHEPPARD, MULLIN, RICHTER & HAMPTON,
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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside Decision and Order of
The National Labor Relations Board.

PETITIONER'S REPLY BRIEF.

1. The Board's Brief Further Emphasizes That the Board's Reversal of the Trial Examiner Was Not Supported by Substantial Evidence.

The Board, in its Brief, makes no effort to support many of the wrong grounds upon which it relied in its Decision and Order for its reversal of the Trial Examiner, but instead now advances new, but equally wrong, grounds:

a. In the Decision and Order, the Board claimed that there was evidence that Petitioner's employees commonly, in their "work-a-day" associations, told the Company to shove it up their butt or stick it up their ass. [R. 66, 68.] There is

no such evidence, as pointed out in Petitioner's Opening Brief, pp. 8, 10.

The Board does not even make a pretense in its Brief of supporting its original wrong assertion on this point.

b. The Board, having abandoned its original wrong assertion that the employees commonly used such language, now turns the other way and equally wrongly claims that the discharge of Reese must have been discriminatory because there is no showing that other employees had ever been discharged for using similar language. (Bd.'s Br. p. 12.)

Since there is no evidence that any other employee ever engaged in such conduct, the fact that the Company did not previously discharge other employees for something which never happened, certainly provides no basis for a finding that when Reese engaged in such conduct, this was not the real reason for his discharge.

c. In the Decision and Order, the Board gave as one reason for its reversal of the Trial Examiner Petitioner's failure to take exceptions to the Trial Examiner's 100% decision in favor of Petitioner. [R. 65-66.] This was fallacious reasoning by the Board and, in any event, it is not "evidence" justifying reversal of the Trial Examiner. (Pet. Op. Br. p. 11.) The Board's Brief makes no attempt to justify its original wrong contention on this point.

d. In the Decision and Order, the Board wrongly sets forth that Petitioner offered no reason for

imposing the harshest penalty on Reese. [R. 67, 68; Pet. Op. Br. p. 10.]

The Board now concedes that Petitioner in fact gave its explanation for discharging Reese and, instead of (as originally) completely denying the existence of this explanation, the Board now takes the new position that the explanation should be rejected merely because the Board disagrees with it. (Bd.'s Br. p. 13.)

e. The Board, in its Brief, says "Moreover, Reese was considered a good employee during his entire tenure" (Bd.'s Br. p. 12), citing R. 32, R. 67 and T. 454. This is another instance of the Board's going beyond the record, and simply is not true.

The true fact is that in early 1966, a few months before Reese's discharge, his work was defective and careless, and he was warned for this. [R. 30:20-33:13.] As the Trial Examiner found [R. 33:1-13] and as adopted by the Board [R. 64], the "overwhelming" evidence "abundantly" establishes that the warning was justified. Also, as noted on the Merit Rating Form in connection with the very wage increase which triggered Reese's insubordination, "He has improved in a lot of ways. Very good performance, *but he needs to improve in his attitude.*" [R. 34:17-59; Resp. Ex. 10; emphasis added.]

The Board says that at the time of his discharge, Reese was being considered for a supervisory position (Bd.'s Br. p. 12), but the only source cited by the Board for this proposition is Reese's own testimony [R. 35:57-60; T. 89:1-8],

which, by-and-large, was repeatedly and sharply discredited by the Trial Examiner. [R. 24:45; 26:10-14; 26:26-31.]

The Board says Reese had made some “money-saving suggestions” to the Company. (Bd.’s Br. p. 12.) This is a deceptive inaccuracy. What the record actually shows is that he had made some “constructive” suggestions almost three years before his discharge. [R. 32:43-47; R. 67; T. 456:16-458:3.]

f. The Board says that the Company’s discharge of Reese “while retaining the two other employees who acted in a similar manner” provides “ample basis” for the Board’s finding that Reese was discharged for an unlawful discriminatory reason. (Bd.’s Br. p. 15.)

It provides no such thing, and we respectfully trust that the day will never come when it can be said that when three employees are engaged in protected concerted activity and one of them is discharged, *failure* to discharge the others supplies substantial evidence that the discharge of the one was in fact caused by the concerted activity of the three. This is a total *non sequitur*, and such a theory, in effect, says that the commission of one unlawful act is proved by evidence of the non-commission of two others. The Board’s heavy reliance on such nonsense underscores the insubstantial basis on which the Board reversed the Trial Examiner.

g. In any event, in urging that the three employees “acted in a similar manner” (Bd.’s Br. p. 15), the Board again manufactures facts. The

three employees did *not* “act in a similar manner,” and that is the whole crux of this case. Neither of the other two employees told the Company to shove it up their butt or stick it up their ass, and it is completely misleading for the Board to argue that they acted “in a similar manner.”

The Board, in seeking to justify its reversal of the Trial Examiner, has, in both its Decision and its Brief, misstated the evidence, has created circumstances that have no basis in the realities of this case, and has relied upon strange concepts of how lack of evidence (rather than substantial evidence) proves that Petitioner acted unlawfully. In so doing, the Board has improperly reversed the Trial Examiner’s findings of fact.

2. The Board Improperly Reversed the Trial Examiner’s Findings of Fact.

The Board asserts that “in reversing the Trial Examiner, the Board did not disturb his findings of fact or credibility findings, but merely drew different conclusions from those findings. Under such circumstances, the Trial Examiner’s contrary conclusions are not entitled to special weight.” (Bd.’s Br. fn. 8, p. 7.)

This is a wrong statement.

Petitioner’s motivation, intent or reason for discharging Reese is a question of fact. (*NLRB v. Stafford*, 206 F. 2d 19, 22, 23 (8 Cir. 1953).) A man’s motive, like his intent, is as much a fact as the state of his digestion. (*NLRB v. Park Edge Sheridan Meats, Inc.*, 341 F. 2d 725, 728 (2 Cir. 1965).) Accordingly, when the Board reversed the Trial Examiner, the Board

did disturb his findings of fact and credibility findings.¹

Implicit in the Board's reversal of the Trial Examiner is a categorical rejection of the unanimous sworn testimony of management that they considered Reese to be insubordinate and that that was the sole reason for his discharge. [T. 292:23-293:21; 295:6-12; 384:11-14; 450:24-451:3; 481:1-4; 502:22-506:2; 548:8-549:15.]

It may be true that the Board is not "bound"² by this unanimous sworn testimony (Bd.'s Br., fn. 10, p. 9), but when (as here) the testimony is consistent with the findings of the Trial Examiner, both the testimony and the findings of the Trial Examiner are entitled to particular significance (*Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493-497 (1950)), and the Board may not (as it did here) reverse the Trial Examiner for trivial, insubstantial or fabricated reasons. (*Lozano Enterprises v. NLRB*, 357 F. 2d 500, 502 (9 Cir. 1966); *NLRB v. Park Edge Sheridian Meats, Inc.*, *supra*, 341 F. 2d at 728-729 (2 Cir. 1965); *NLRB v. Stafford*, *supra*, 206 F. 2d at 23.)

¹It should be noted that despite the Board's claim in its footnote 8 that it did not "disturb" the Trial Examiner's findings of fact, on the same page of its brief the Board says "the Board *found*, contrary to the Trial Examiner, . . ." (Bd.'s Br. p. 7.)

²Contrary to the Board's assertion in its footnote 10, Petitioner never has claimed that the Board is "bound" by such unanimous sworn testimony, but only that such testimony cannot be disregarded as blithely as the Board has disregarded it in this case. (Pet. Op. Br. p. 12.)

3. The Cases Cited by the Board Are Distinguishable.

The Board relies on *Butcher Boy Refrigerator Door Company, Inc.*, 127 NLRB 1360, 46 LRRM 1192 (1960), enf'd 290 F. 2d 22 (7 Cir. 1961). (Bd.'s Br. pp. 9, 10.) However, in its decision in that case, the Seventh Circuit expressly distinguished the *Butcher Boy* situation from the situation in the Seventh Circuit's decision in *Miller Electric Mfg. Co. v. NLRB*, 265 F. 2d 225 (7 Cir. 1959) on the ground that in the former, there was evidence of anti-union animus on the part of the employer. (290 F. 2d at 23.) In the present case, the Trial Examiner expressly found that there was no manifestation by Petitioner of opposition to the union or to the self-organizational rights of the employees [R. 29:45-47], no anti-union animus, hostility, or other misconduct on the part of Petitioner [R. 29:53-30:3], and "there is a total absence of evidence of anti-union animus, hostility or opposition to the Union, or of the commission of unfair labor practices by Respondent [Petitioner]" [R. 40:33-35]. These findings (with the single exception of Reese's discharge) were adopted by the Board. [R. 64.]

Under the circumstances, the Seventh Circuit's *Miller Electric* decision is far more pertinent to the present case than is its *Butcher Boy* decision; as the court said in *Miller Electric* (265 F. 2d at 226):

"The burden was on the Board to prove that Buchberger was discriminatorily discharged . . . [Citations.] . . . '[W]hen viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view', we cannot conscientiously find that the evidence

supporting the decision even remotely approaches substantiality. . . . [Citation.] . . . There must be a limit to the amount of strain the Board can place upon threadbare testimony. Here the evidence, when considered in its entirety as we are bound to do, clearly preponderates in favor of Buchberger's lawful discharge. He was subject to discharge for legal cause and the fact that he was engaged in union activity was a coincidence which did not render the just cause invalid."

Aeronca Mfg. Co. v. NLRB, 385 F. 2d 724 (9 Cir. 1967), cited and relied upon by the Board (Bd.'s Br. p. 13), is not in point. In that case, there was "acidulous and acrimonious" anti-union animus on the part of the employer (385 F. 2d at 728), a situation not present in the present case. Also, in *Aeronca* none of the supervisors talked to the employee prior to his discharge nor was an investigation of any sort conducted to determine whether the accusation against the employee was accurate. (385 F. 2d at 728.) In the present case, a full investigation was conducted and Reese admitted the accusation. [R. 35:16-36:26.]

4. Conclusion.

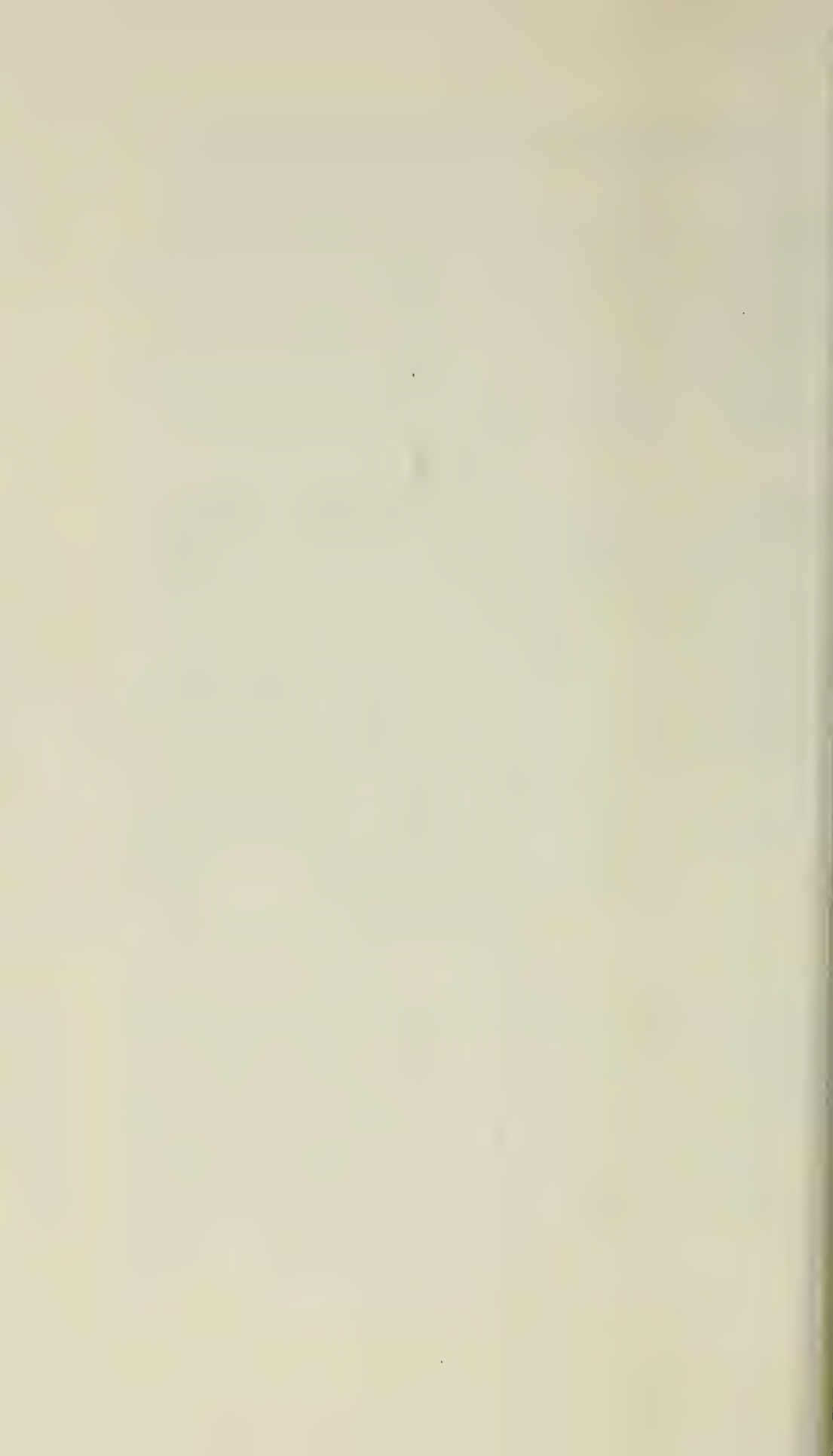
It is well-settled that engaging in activity protected by the Act does not shield an employee from discharge for cause. (See, *e.g.*, *Miller Electric Mfg. Co. v. NLRB*, 265 F. 2d 225, 226 (7 Cir. 1959).) Here, the Trial Examiner expressly found that Reese's conduct "undoubtedly provided cause for discharge" [R. 38:40-42] and that Petitioner was not unlawfully motivated in discharging Reese. [R. 41:5-28.]

It is undisputed that Reese told the Company to “shove it up their butt” or “stick it up their ass.” The fact that Reese may have been engaged in concerted activity did not prevent his discharge. His insubordination was wholly unnecessary to carry on his legitimate concerted activity, and therefore was indefensible and unprotected by §7 of the Act. (*NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); *NLRB v. International Brotherhood of Electrical Workers*, 346 U.S. 464, 477 (1953).)

Here, the Board, based on contrived, untrue, and demonstrably wrong facts, on insubstantial and patently misleading statements of the evidence, and on illogical concepts has (improperly) substituted its judgment for that of management and has (improperly) reversed the fact-finder’s findings of fact. This, the Board cannot do. (*NLRB v. Sebastopol Apple Growers Union*, 269 F. 2d 705, 711 (9 Cir. 1959).)

Respectfully submitted,

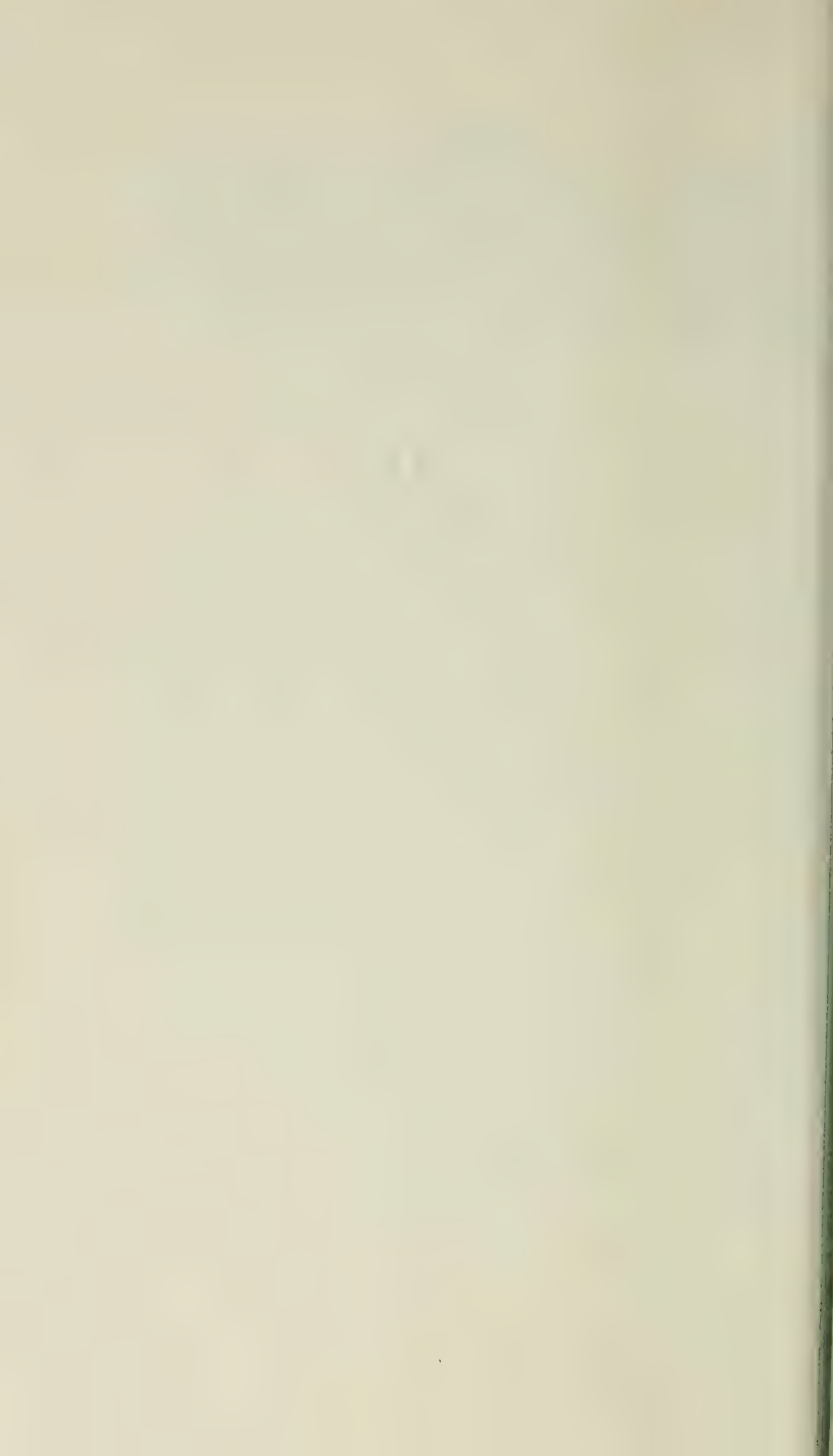
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HAMPTON,
FRANK SIMPSON,
Attorneys for Petitioner.



Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK SIMPSON



No. 21883

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRITISH AUTO PARTS, INC.,

Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

OPENING BRIEF OF APPELLANT BRITISH
AUTO PARTS, INC.

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WM. B. LUCK, CLERK

NOV 21 1967

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No. 21883

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRITISH AUTO PARTS, INC.,

Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

OPENING BRIEF OF APPELLANT BRITISH AUTO PARTS, INC.

Jurisdictional Statement.

Under 28 U.S.C. 1291 this Court has jurisdiction to hear appeals with respect to final orders of the District Courts. The order of the District Court below enforcing a subpoena of the National Labor Relations Board is such a final order.

Statement of the Case.

This action was commenced by Appellee, National Labor Relations Board, seeking enforcement of its Subpena. The Subpena issued by the Board sought the production of the names and addresses of the employees of Appellant, British Auto Parts, Inc., pursuant to the Board's *Excelsior* Rule.

British Auto Parts, Inc. is an employer engaged in the importation and wholesale distribution of automo-

bile parts in interstate commerce. [Fndg. 2, Clk. Tr. 94.] Appellee is an administrative agency established by the National Labor Relations Act (referred to hereafter as the "Act" [29 U.S.C. §151 *et seq.*]) and is empowered and directed to administer the provisions of that Act, including the investigation of questions of employee representation under §9 thereof. (29 U.S.C. §159.) [Fndg. 1, Clk. Tr. 94.]

On March 17, 1966, a labor organization (General Warehousemen, Local Union No. 598, International Brotherhood of Teamsters Chauffeurs Warehousemen and Helpers of America) filed a petition with the Board's 21st Region at Los Angeles, California, asserting its claim to represent Appellant's employees and seeking a representation election to establish its majority status. The proceedings instituted by this petition were known on the records of the Board as Case No. 21-RC-9986. [Fndg. 4, Clk. Tr. 94.]

On April 12, 1966, the Regional Director of the 21st Region approved a Stipulation For Certification Upon Consent Election entered into by Appellant and the Union. [Fndg. 5, Clk. Tr. 94.] On April 19, 1966, Appellant filed with the Regional Director an Election Eligibility List which contained the names of its employees, but omitting their addresses. [Fndg. 9, Clk. Tr. 95.]

On May 2, 1966, an election was conducted in which three employees cast valid ballots for the Union and four cast valid ballots against. The Board, however, sustained the Union's objection to the election on the ground that Appellant had refused to furnish the addresses of its employees to the Board pursuant to its

Excelsior Rule, and set the election aside. A second election was directed. (160 N.L.R.B. No. 40.) [Fndg. 10, Clk. Tr. 95.]

On August 4, 1966, the Regional Director notified Appellant that a second election was to be conducted on September 12, 1966, and requested that an election eligibility list of Appellant's employees' names and addresses be filed not later than August 11, 1966, as required by the Board's order and the *Excelsior* Rule. [Fndg. 11, Clk. Tr. 95.] Appellant did not furnish an election eligibility list containing the addresses of its employees pursuant to the *Excelsior* Rule. [Fndg. 12, Clk. Tr. 95.]

Thereafter, the Union notified the Regional Director that it did not wish to proceed to the second election until Appellant furnished the eligibility list containing both the names *and* addresses of its employees. The Regional Director thereafter notified the parties that the second election had then been postponed. [Fndg. 13, Clk. Tr. 95.]

On September 4, 1966, the Regional Director caused a Subpena Duces Tecum to be issued directing Appellant to produce and make available to the Board's Regional Office, personnel and payroll records, or an eligibility list in lieu thereof, containing the names and addresses of all the employees eligible to vote in the election. [Affd. of Norman E. Jones, Ex. "D".] The Subpena was served on Appellant by registered mail on September 15, 1966. [Affd. of Norman E. Jones 2, Clk. Tr. 76.] On September 20, 1966, Appellant filed a Petition To Revoke The Subpena pursuant to §102.31 (b) of the Board's rules and regulations. [Affd. of Norman E. Jones 2, Clk. Tr. 76.] This Petition To

Revoke was denied by formal telegraphic order issued on September 22, 1966. [Affd. of Norman E. Jones, Ex. "G".]

Although this Subpena called for Appellant's appearance before Ralph E. Kennedy, Regional Director; when Appellant appeared at the time and place designated in said Subpena, Ralph E. Kennedy was absent. [Affd. of Norman E. Jones, 2-3, Clk. Tr. 76-77.]

On October 3, 1966, the Regional Director caused a second Subpena Duces Tecum to be issued, directing Appellant to produce and make available to the Board's Regional Office Appellant's personnel and payroll records, or an eligibility list in lieu thereof, containing the names and addresses of all employees eligible to vote in the election. [Fndg. 14, Clk. Tr. 96.] The second Subpena was identical to the first Subpena save only for the date of appearance. [Affd. of Norman E. Jones, Exs. "D" and "I".] The Subpena was served upon Appellant by registered mail on October 4, 1966. Appellant did not file a Petition To Revoke this Subpena. The District Court concluded that the filing of such a Petition would have been an idle and futile act. Appellant appeared on October 12, 1966, the return date of the Subpena, but did not produce the materials called for. [Fndg. 16, Clk. Tr. 96.]

Appellant has at all pertinent times maintained the policy of strict confidentiality with respect to its employees' names and addresses. Each applicant for employment with Appellant is required to execute an employment application in which Appellant agrees it will not divulge the contents of the application to third persons. The consideration for this agreement is the acceptance for employment and continuing employment

of the applicant. [Affd. of Richard C. Smith, paragraph 4, page 2, Clk. Tr. 79.]

Each of Appellant's employees who are employed in the bargaining unit involved in this proceeding signed these employment applications. There were approximately eight (8) eligible voters employed in the bargaining unit involved in this proceeding at the time that the election was held on May 2, 1966. [Affd. of Richard C. Smith 2, Clk. Tr. 79.]

Representatives of General Warehousemen, Local No. 598 had access to each of Appellant's employees on Appellant's premises during lunch hours and during rest periods at all times prior to the elections which were scheduled. These representatives personally communicated with Appellant's employees on these occasions. [Affd. of Richard C. Smith, paragraph 11, page 3, Clk. Tr. 80-81.]

Prior to both the elections held on May 2, 1966, and the election which was directed for September 12, 1966, Appellant delivered to each of its employees a letter which fairly explained Appellant's policy of non-disclosure, and the Board's *Excelsior* Rule. This letter was accompanied by a properly stamped envelope addressed to the Regional Office of Appellee. The envelope and letter permitted each of Appellant's employees to exercise his own free choice as to whether or not he wanted to supply the Board and General Warehousemen Local No. 598 with his address. [Affd. of Richard C. Smith, paragraph 9, page 3, Ex. "C", Clk. Tr. 80.] Appellee seeks the addresses of Appellant's employees for the *sole purpose* of delivering them to General Warehousemen's Local No. 598.

Specification of Errors.

1. The District Court erred in holding that it had jurisdiction to enforce the Subpena under 29 U.S.C. §161(2) in that the Subpena does not require the production of any evidence relevant to a proceeding before the National Labor Relations Board.

2. The District Court erred in finding that it had jurisdiction to enforce the Subpena under the provisions of 28 U.S.C. §1337.

3. The District Court erred in failing to find that it lacked jurisdiction to enforce the Subpena in that the National Labor Relations Board failed to exhaust its own administrative remedies.

4. The District Court erred in failing to find that enforcement of the Subpena would deprive Appellant's employees of their right to be left alone.

5. The District Court erred in failing to give effect to the contracts of employment which provided for non-disclosure of the names and addresses of the employees, which failure constituted an unjustified deprivation of contract rights.

6. The District Court erred in failing to protect the rights of Appellant's employees under Section 7 of the National Labor Relations Act.

Summary of Argument.

The District Court erred in holding that it had jurisdiction under Section 11(2) of the National Labor Relations Act [29 U.S.C. § 161(2)] for the simple reason that Section 11(2), by its terms, is limited to subpoenas requiring the production of evidence. The material sought to be produced by this subpoena has no bearing whatever on any action or proceeding pending before the Board. It will, in no way, facilitate Appellee's decision making process. It in no way assists the Board in carrying out its statutorily authorized duties.

The Board in this instance is acting as no more than a conduit for the union. The statutory language in this regard is quite clear. The issuance and enforcement of administrative subpoenas of the National Labor Relations Board is limited to subpoenas seeking evidence. No matter how broadly we construe the definition of the term "evidence", it is impossible to conclude that the information sought is within the scope of its meaning.

The District Court further erred in finding that it had jurisdiction to enforce the subpoena under the general catch-all provisions of Section 1337 of the United States Code. This section, because of its generality, must give way to the specifically applicable sections of the National Labor Relations Act. If we indulge the District Court's findings in this matter, we must conclude that the specific jurisdictional sections of the National Labor Relations Act are of absolutely no meaning or effect. The end result of the Court's holding in

this matter is that it makes absolutely no difference what the Labor Relations Act says with regard to jurisdiction; for even if jurisdiction has not been granted within the well thought out scheme of the National Labor Relations Act it will be imposed on the basis of this catch-all jurisdictional section. Such a holding obviously ignores the intent of Congress.

Moreover, the District Court erred in finding that it had jurisdiction in that Appellee failed to exhaust the administrative remedies available to it. The Board has failed to comply with the enforcement procedures provided it by Congress. It is a well established principle of law that a court will not accept jurisdiction until administrative remedies have been exhausted.

Perhaps the most disturbing feature of the District Court's decision is that in rigidly applying the *Excelsior* doctrine to this case it violates the constitutional rights of Appellant and Appellant's employees in several instances.

The contractual rights of Appellant and its employees are totally ignored. There is no question that where strong social goals and private property rights are in conflict the property rights may give way under appropriate circumstances. But here the Court has ignored the fact that a reasonable alternative exists by which both ends may be served. The union could fully communicate to Appellant's employees and Appellant and its employees could retain their contractual rights. In such a situation it is clearly unconstitutional to deprive Appellant and its employees of their contractual rights.

With respect to Appellant's employees, it is moreover clear that the enforcement of this doctrine deprives

them of their right of free association and to privacy. This is substantiated by the fact that the Court below ignored the desires voiced by several of the employees to be left alone. The point to be made is this: in the ever more complex and public life men are forced to live, it is absolutely necessary that they be able to control at least a portion of their existence. They should be allowed to freely determine who shall and who shall not be given a license to come knocking at their door any time, day or night.

Section 7 of the National Labor Relations Act protects the right of employees to have union representation and it also provides a statutory right for employees to reject union representation. The employees in declining to have their names and addresses sent to the Board, and in turn to the union, exercised their rights under Section 7 to refuse to hear any more from the union. It is incumbent upon the Board to give this decision by the employees dignity equal to that which they would ascribe to a decision favorable to union representation.

ARGUMENT.

I.

The United States District Court Lacked Jurisdiction Over the Subject Matter of This Action.

In the first count of its Complaint, Appellee contended that the District Court had jurisdiction of this proceeding by reason of Section 11(2) of the National Labor Relations Act [29 U.S.C. §161(2)]. That section, in relevant part, provides:

“In case of contumacy, or refusal to obey a subpoena issued to any person, any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, *there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question . . .*” (Emphasis added.)

Appellee acknowledges that its subpoena power is limited to those instances where it acts within its statutory authority, where its action is not arbitrary, and where the information sought is not “plainly incompetent or irrelevant to any lawful purpose.” [Plaintiff’s Memo., pp. 4-6; Clk. Tr., 12-14.] But it is not for the Board to determine whether these tests have been met.

As the Court said in *Goodyear Tire & Rubber Co. v. N.L.R.B.*, 122 F. 2d 450, 453 (6th Cir. 1941):

“ . . . the statute does not require the District Court to issue the order, but simply gives it jurisdiction to issue. The enforcement of the subpoena is thus confided to the discretion of the District Court, which is to be judicially exercised . . . ”

It is apparent that the standards for subpoena enforcement acknowledged by the Board are not present here. This is so because the *Excelsior* doctrine, as applied to the facts of this case is plainly contrary to the employees' and the Appellant's constitutional and statutory rights. (See pp. 20-31 herein for a complete discussion of this point.) Thus, this subpoena which seeks to implement that doctrine is neither within the Board's statutory authority nor is it competent or relevant to any lawful purpose. Consequently, the subpoena sought to be enforced is invalid and thus, by Appellee's own admission, beyond the jurisdiction of this Court to enforce.

A. The Appellee's Subpena Does Not Seek "Evidence" Touching a Matter Being Investigated.

Section 11(1) of the Act, the section which grants subpoena power to the Board, speaks solely in terms of "evidence" and "testimony touching the matter under investigation or in question." Clearly, the matter being investigated or in question in the underlying representation proceeding is the status of the union as majority representative, and not the identity and addresses of

Appellant's employees. Section 11(2) of the Act, which gives United States District Court jurisdiction to issue orders enforcing Board subpoenas, states that such orders shall require the person subpoenaed to produce "evidence" or give "testimony". Nowhere in the Act is there any provision that the United States District Court shall have the jurisdiction to order the production of anything but testimony or evidence.

"Evidence is the demonstration of a fact; it signifies that which demonstrates, makes clear, or ascertains the truth of the fact or point in issue, either on the one side or on the other. In legal acceptance, the term "evidence" includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." 31 C.J.S., *Evidence* Section 2; Accord; *N.L.R.B. v. Sun Shipbuilding & Dry D. Co.*, 135 F. 2d 15, 25 (3d Cir. 1943); *N.L.R.B. v. Bell Oil & Gas Co.*, 98 F. 2d 870, 871 (5th Cir. 1938); 3 Wigmore on Evidence, Vol. I, Section 1.

The list of names and addresses sought by the Appellee in no way constitutes evidence. Appellee wishes to have this list for no other purpose than that of turning it over to the union. By no stretch of the imagination can it be said that the presentation of this list to Appellee will tend to prove or disprove any fact at issue before the Board in its representation proceedings. In fact, it is highly doubtful that the Appellee will even examine the list. The Board here is acting simply as a conduit for the transmission of information to the union. The subpoena power granted the Board by Congress was intended to aid it in its investigations of

problems within the scope of its authority. It is clear from a reading of the statutes that it was never intended that the Board be allowed to use its broad subpoena power to gather information *solely* for its transmission to one of the parties to a representation proceeding.

When the Board issues a document calling for names and addresses, so as to facilitate visits or communications with the persons named, the Board is not calling for testimony or evidence to prove or disprove any fact in dispute or under investigation, and it therefore is not issuing anything that Section 11 of the Act authorizes it to issue, or that Section 11 of the Act authorizes the District Court to enforce. [29 U.S.C. §161 (1) and (2).]

The proposition that administrative subpoenas shall not be enforced which seek information which is not evidence in a hearing or proceeding, has been well established by the Supreme Court of the United States in the case *F.T.C. v. American Tobacco Company*, 264 U.S. 298, 306 (1924). In that case it was held:

“. . . The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence.” (264 U.S. at 306).

This principle is clearly reaffirmed in *Goodyear Tire & Rubber Co. v. N.L.R.B.*, 122 F. 2d 450, 453 (6th Cir 1941).

By way of summary, the subpoena which Appellee seeks to enforce here does not require the production of evidence or the testimony of witnesses within the well-established meaning of those terms. Moreover it is

unenforceable because of the invalidity of the *Excelsior* doctrine as applied to this case. In either event, Section 11(2) of the Act does not confer jurisdiction on the District Court to grant the order sought by Appellee.

B. The District Court Lacks Jurisdiction Under 28 U.S.C. Section 1337, to Enforce the Excelsior Doctrine.

As an alternative request, Appellee asked the District Court to enforce its *Excelsior* doctrine through the issuance of a mandatory injunction requiring Appellant to file with the Board's Regional Director a list of the names and addresses of Appellant's employees. The District Court found that this alternative basis of jurisdiction was conferred by 28 U.S.C., Section 1337, which provides that:

"The district courts shall have original jurisdiction of any action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

The District Court plainly lacked jurisdiction to grant the Appellee's injunction request. It is clear that general statutes do not confer jurisdiction where the regulatory statute in question precludes it. See *Schilling v. Rogers*, 363 U.S. 66 (1960); *Skelly Oil Co. v. Phillips Co.*, 339 U.S. 667, 671 (1949); *McCauley v. Waterman S. S. Corp.*, 327 U.S. 540, 545 (1945). And it is equally clear that in enacting the regulatory statute here involved, the National Labor Relations Act (29 U.S.C., Sec. 151, *et seq.*), Congress clearly provided the manner in which it was to be enforced and made effective. See *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264 (1939), where,

with respect to the National Labor Relations Act itself, the Supreme Court has recognized that "Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective." See also, *Switchmens Union v. National Mediation Board*, 320 U.S. 297, 301 (1943).

The foregoing principles were applied in *Uyeda v. Brooks*, 365 F. 2d 326 (6th Cir. 1966), where the Sixth Circuit held that because Congress had provided the manner in which the National Labor Relations Act was to be enforced and made effective, the District Court was foreclosed from exercising jurisdiction. Indeed, the lack of United States District Court jurisdiction in representation cases has been repeatedly upheld by the courts. *Urethane Corp. v. Kennedy*, 336 F. 2d 564 (9th Cir. 1964); *Consolidated Edison Company v. McLeod*, 302 F. 2d 354 (2d Cir. 1962); *Department & Specialty Store Emp. Union v. Brown*, 284 F. 2d 619 (9th Cir. 1961). Moreover, how Congress intended the purposes and provisions of the National Labor Relations Act to be effectuated and enforced is quite clear. Sections 10(e) and 10(f) of that Act clearly contemplate that only "final orders" of the Board, which are issued *only* in unfair labor practice proceedings and not in representation proceedings, shall be reviewed and enforced by judicial action; and the power to review and enforce such actions is vested, moreover, not in the federal district courts, but rather in the circuit courts of appeal of the United States. Thus, in *American Federation of Labor v. Labor Board*, 308 U.S. 401 (1940), the Supreme Court held that a

Board order in representation proceedings under Section 9 of the National Labor Relations Act is not “a final order”, and therefore is not subject to judicial review except as it may be drawn in question by a petition for enforcement or review of an order, made under Section 10(c) of the Act, restraining an unfair labor practice. See also *Boire v. Greyhound Corporation*, 376 U.S. 473 (1964), *Cf. Leedom v. Kyne*, 358 U.S. 184 (1958). (Parenthetically, it should be expressly noted in this connection that in this case Appellee did not even seek the enforcement of a Section 9 order it issued in a representation proceeding involving Appellant; rather it sought, under the guise of subpoena enforcement proceedings and under a naked claim of district court jurisdiction under 28 U.S.C., Sec. 1337, the enforcement and implementation of a dubious doctrine announced in another representation proceeding, the *Excelsior Underwear* case. Even if Appellee sought enforcement of its own order in the *British Auto Parts Decision* [Complaint Ex. “E”, Clk. Tr. 22] that Appellant furnish the addresses of its employees, *American Federation of Labor, supra*, is square authority that such an order is not subject to judicial enforcement.)

This is not to say that federal district courts are completely lacking in jurisdiction with respect to National Labor Relations Board proceedings. But such authority as is given district courts over such proceedings is affirmatively spelled out in the National Labor Relations Act itself. Thus, aside from the power to enforce Board subpoenas granted under Section 11, jurisdiction is vested in the district courts under Section 10(j) and 10(1) to grant injunctive relief ancillary to

the Board's powers to prevent unfair labor practices within the meaning of Section 8. Certainly, in view of such specific grants of jurisdictional power, it would be logically inconsistent to say that Congress likewise intended that district courts should also exercise jurisdiction over N.L.R.B. matters under the general jurisdictional grant of 28 U.S.C., Section 1337. For if the latter was in fact the Congressional intent, the specific grants must be regarded as wholly superfluous.

II.

The District Court Lacks Jurisdiction in That Appellee Failed to Allege Exhaustion of the Administrative Remedies Available to It.

Assuming, *arguendo*, the validity of the *Excelsior* theory, Appellee contends that, if its sole sanction in enforcing the doctrine is to set aside elections, persistent noncompliance would block a valid election indefinitely. [Plaintiff's Memo, p. 16, n. 14, Clk. Tr. 24.] In support of its argument, Appellee is forced to abandon a position it has uniformly vigorously pressed since the Board's inception, *i.e.*, that the District Courts have no authority over representation proceedings and that the only court review of such matters is through the unfair labor practice procedures. *American Federation of Labor v. N.L.R.B.*, 308 U.S. 401 (1949). It is indeed startling to find the Board now arguing that ". . . where a court can give relief, there is no ground for withholding it on the speculation that relief could be obtained by some other method". This is precisely the opposite of the position the Board has taken in the hundreds of cases where parties have sought relief in the District Courts to avoid the time-consuming and

frequently impractical procedure of a technical refusal to bargain, leading to an unfair labor practice proceeding under Section 8(a)(5) of the Act.

Here, if the Board is convinced of the merit of its *Excelsior* doctrine, effective enforcement of its position should be had by finding the refusal to furnish the list to be interference, restraint and coercion within the meaning of Section 8(a)(1) of the Act. To argue, as did Appellee, that, because the issue has not been ruled upon in an 8(a)(1) proceeding, the Board must be free to rule upon the question without being compelled to do so in order to enforce its election rule, is to mock reality. If, as contended by Appellee the list is essential to a “fair and reasoned employee choice”, it is certainly arguable that failure to furnish the list would be “interference” within the meaning of Section 8(a)(1). Therefore, the Board’s reluctance to have the issue ruled upon in an 8(a)(1) case and, instead, to ask this Court to require furnishing the list while contending that the validity of *Excelsior* is not before the Court [Plaintiff’s Memo, p. 14, Clk. Tr. 22], is a thinly disguised effort to force compliance with *Excelsior* without court review.

Furthermore, the Complaint on file herein fails to allege whether or not the union represents a majority of Appellant’s employees. If the union does have majority status, under the *Bernal Foam Doctrine*¹ the Board could find a violation of Section 8(a)(5) of the

¹*Bernal Foam Products Co., Inc.*, 146 N.L.R.B. 1277 (1964).

Act and thus order an employer to bargain with the union to enforce its *Excelsior* rule.

Thus, by refusing to attempt to enforce the *Excelsior* doctrine through its unfair labor practice machinery, the Board has failed to comply with the procedures established for it by Congress, and it has failed to exhaust its own administrative remedies. The rule is clear that in such cases, the Court will not exercise jurisdiction until the administrative remedies have been exhausted. In *Myers v. Bethlehem Ship Building Corp.*, 303 U.S. 41, 50-51 (1938) the Supreme Court referred to the "long settled rule of judicial administration that no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted." On the same point, see *Franklin v. Jonco Aircraft Corp.*, 346 U.S. 378 (1953); *Aircraft and Deisel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947); *McCauley v. Waterman S. S. Corp.*, 327 U.S. 540 (1946); *Petroleum Exploration, Inc. v. Public Service Commission*, 304 U.S. 209 (1938); *F. P. C. v. Metropolitan Edison Co.*, 304 U.S. 375 (1938).

It is clear that the only way the intent of Congress may be served is by this Court requiring Appellee to follow the administrative procedures established for it by Congress, and enforce its *Excelsior* rule under the provisions regarding unfair labor practices.

III.

The District Court's Application With Wooden Rigidity of the *Excelsior* Rule to This Case Clearly Violates the Employer's and Employees' Constitutional and Statutory Rights.

The application of the *Excelsior* doctrine to the instant case violates Appellant's constitutional rights. It also violates three fundamental constitutional rights of Appellant's employees. They are the rights of freedom of association, the right to privacy and the right of freedom of contract. The application of the *Excelsior* doctrine also violates the employees' rights under Section 7 of the National Labor Relations Act.

A. The Employer's Constitutional Rights.

All of Appellant's employees have signed employment applications. Some of these applications provide:

"All information contained in this application is confidential and will not be divulged without written permission of the person signing this form."

The remaining applications provide:

"Further, it is agreed that all information contained in this application and on the federal W-4 form (if I am hired) is confidential information and cannot be divulged to any Federal, State or other governmental agency, or any individual or firm while I am in the employ of this company without my express written authorization." [Affd. of Richard C. Smith, Exs. "A" and "B", Clk. Tr. 80-81.]

In these employment applications Appellant has plainly and clearly contracted with its employees *not* to dis-

close the contents (including the employees' addresses) of employment applications signed by its employees. The consideration for this contract is provided by the acceptance of employment by the employee and his continued employment. *Bullock v. Sterling Drug, Inc.*, 93 F. Supp. 371 (E. D. Penn. 1950), affirmed; 187 F. 2d 145 (3d Cir. 1951); *Chinn v. China Nat. Aviation Corp.*, 138 Cal. App. 2d 98 (1955); *Hunter v. Sparling*, 87 Cal. App. 2d 711 (1948). Appellee did not even question the existence of a binding contract below.

Thus, there are valid contract rights which are now in existence between Appellant and its employees. Appellee seeks to destroy these rights by a wooden application of the rule in the *Excelsior* case to the instant case.²

The constitutional status of contract rights has been repeatedly established by the courts. *Highland v. Russell Car and Snow Plow Co.*, 279 U.S. 253 (1928); *Prudential Insurance Co. v. Cheek*, 259 U.S. 530 (1921); *Boeing Air Transport v. Farley*, 75 F. 2d 765 (D.C. Cir. 1935). In *Lynch v. United States*, 292 U.S. 571 (1933) the court stated:

"The Fifth Amendment commands that property be not taken without making just compensation. *Valid contracts are property*, whether the obligor be a private individual, a municipality, a State or the United States." (292 U.S. at 579. Emphasis added.)

Furthermore, it is clear that any party to a contract has standing to object to governmental action which

²In this connection it is pertinent to note that in *Excelsior* there was no contract in existence between the employees and the employer prohibiting disclosure.

seeks to deprive such a party of his property rights. *Everglades Drainage District v. Florida Ranch & D. Corp.*, 74 F. 2d 914, 917 (5th Cir. 1935).

Admittedly the property rights created in Appellant by its contracts with its employees are not absolute. They are, of course, subject to reasonable regulation. See *Prudential Insurance Co. v. Cheek*, *supra*; *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 228 (1899).

However, the correct balancing of an employer's property rights with the right of a union to communicate with the employer's employees has already been clearly established by the courts, and the wooden application of the *Excelsior* rule to the instant case is squarely contrary to that correct balancing.

In *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) the United States Supreme Court considered the question of the circumstances, if any, under which an employer's property rights must yield to allow union organizers to come onto his premises to communicate with his employees. The Court addressed itself to the question of balancing as follows:

"Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by non-employ-

ees to communicate with them through the usual channels, the right to exclude from peroperty has been required to yield to the extent needed to permit communication of information on the right to organize.” (351 U.S. at 112.)

The court otherwise stated the principle of *Babcock & Wilcox* as follows:

“It is our judgment, however, that an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer’s notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled regulations as the orders in these cases permit. (351 U.S. at 112.)

Thus, the rule is plain that an employer’s property rights will *not* be required to yield to the attempts of outside union organizers to communicate with his employees where reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message.

The principle of *Babcock & Wilcox* was relied upon by the Sixth Circuit in *May Department Stores v. N.L.R.B.*, 316 F. 2d 797 (6th Cir. 1963). In *May*, the Board had decided that in an organization campaign an employer could not deny a union an equal opportunity to reply, on company time and property, to the employer’s anti-union, but non-coercive, speeches.

The Board theorized that the employer's action *per se* created a "glaring imbalance in opportunities for organization communications." The Court of Appeals, however, relying specifically on the principles laid down by the Supreme Court in the *Babcock & Wilcox* case, *supra*, and on an earlier Sixth Circuit decision, *N.L.R.B. v. F. W. Woolworth*, 214 F. 2d 78 (6th Cir. 1954), reversed the Board. The Court emphasized that there was no Board findings of "non-accessibility amounting to a handicap to self-organization" or "that the employees, away from the employer's premises are removed or isolated from normal, usual communications." The Court said:

"... neither the use of the magic word 'imbalance' nor the characterization of alternative avenues of communication as 'ineffective' . . . can give the union a right of access which the Supreme Court of the United States has refused to recognize and which it does not possess." (316 F. 2d at 801.)

When the principle of these decisions is applied to the facts of the instant case, the following is apparent:

1. Appellant has contracted with its employees not to disclose their names and addresses to outside interests;
2. These contracts constitute valid property rights under the due process clause of the Fifth Amendment to the United States Constitution;
3. The United States Supreme Court has plainly and clearly held that an employer's property rights will yield to an outside union's attempts to communicate with employees *only* where reasonable alternative means of communication are unavailable;

4. There has been no finding that alternative means of communication with Appellant's employees by Local 598 of the Teamsters are unavailable;

5. In fact, representatives of Local 598 were expressly invited to come onto the Appellant's premises and communicate with its employees during their non-working time [Affd. of Norman E. Jones, Ex. "A", Clk. Tr. 77] and they did not accept this invitation to communicate with Appellee's employees. [Affd. of Richard C. Smith, paragraph 11, Clk. Tr. 81];

6. The attempt by Appellee to force a wooden compliance with its *Excelsior* rule in the circumstances of this case is *squarely contrary* to the provisions of the Fifth Amendment to the United States Constitution and the principle of *Babcock & Wilcox*, and should not be allowed.

B. The Employees' Constitutional Rights to Free Association and Privacy.

The United States Supreme Court has carefully considered the constitutional rights of members of a group to keep their identity and addresses secret. In *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958), the Court said:

"We think that the production order (for the names of the members of the NAACP in Alabama) . . . must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." (357 U.S. at 462).

The list in the *Alabama* case was to be furnished to a government official, the state attorney general. Here Appellee seeks to furnish the list to Local 598 of the Teamsters Union, a private organization.

In recent years the field of law concerning the right of privacy has undergone extensive consideration. The Supreme Court in *Griswold v. State of Connecticut*, 381 U.S. 479, 484-485 (1965), reiterated the pervasive notion that a man's privacy is a right subject to Constitutional protection. It said:

"The Fourth and Fifth Amendments were described in *Boyd v. U.S.*, 116 U.S. 616, 630, . . . as protection against all governmental invasions of the 'sanctity of a man's home and the privacy of life.' We recently referred in *Mapp v. Ohio*, 367 U.S. 643, 656, . . . to the Fourth Amendment as creating a 'right of privacy no less important than any other right carefully and particularly reserved to the people.' " (381 U.S. at 484-485.)

The common and statutory law of the various states also has continued to expand the concept by providing new and varied causes of action for invasions of privacy. In a recent note on the right to privacy, *40 Notre Dame Law* 324 (1956), the authors state that at least 31 jurisdictions have recognized rights of action based on concepts of privacy.

The right of private citizens to be free from bothersome intrusions into their private lives is also the subject of another line of judicial authority. These decisions plainly uphold the constitutionality of municipal ordinances which prohibit door to door canvassing where the resident has not previously manifested his

consent to be called upon. *Breard v. Alexandria*, 341 U.S. 643 (1951); *Green River v. Fuller Brush Co.*, 65 F. 2d 112 (10th Cir. 1933).

These decisions hold that the constitutional right of the resident to be left alone outweighs the constitutional rights of outsiders to communicate with him at his home.

The parallel to the instant case is striking. Here the employees have affirmatively manifested a desire to be left alone. The rights of outside union organizers, whatever they may be, most certainly fall short of the employees' rights to be left alone.

Likewise the standing of an employer to assert the right to be left alone of its employees is just as great as the standing of a municipality to assert the right of its residents to be left alone.

Appellee's position in the instant case is particularly contrary to the rights of Appellant's employees to freely associate and be "left alone" for the following reasons:

1. Each of Appellant's employees was given a letter affixed to a postage prepaid envelope, properly addressed to the Regional Director of the National Labor Relations Board. [Affd. of Richard C. Smith, Ex. "C", Clk. Tr. 81.]

2. By the simple expedient of the employee placing his name and address upon the space provided at the bottom of the letter and placing it in the mail, each employee could exercise his personal prerogative to receive written and personal communications from the union organizers at their homes. In fact Exhibit "D" to the complaint on

file herein (page 19) reveals that two employees did exercise this right.

3. Conversely, it is obvious that those employees who *refrained* from following this simple expedient, then and there exercised their *personal right* to refrain from associating with union organizers who would knock upon the doors of their homes in the middle of the night or bother their wives at the dinner hour. They exercised their right of privacy, and they did so in absolute secrecy. [Affd. of Richard C. Smith, paragraph 10, Clk. Tr. 81.]

4. Appellee's position in this case is to destroy the rights of freedom of association and to privacy, which Appellant's employees have affirmatively sought to exercise by voluntarily refraining from providing the N.L.R.B. and hence the union organizers, with the means of invading these rights.

C. Violation of the Property Rights of Appellant's Employees.

As pointed out *supra*, at page 20, each of Appellant's employees is a party to a valid and enforceable contract in which Appellant has obligated itself to refrain from disclosing their addresses to outsiders.

These contract rights are clearly "property" of the employees. *Lynch v. United States*, 292 U.S. 571 (1934); *Prudential Insurance Co. v. Cheek*, 259 U.S. 530 (1921); *Boeing Air Transport v. Farley*, 75 F. 2d 765 (D.C. Cir. 1935).

The employees' constitutional right to be free from deprivation of *their* property is just as real and substantial as the constitutional right of free association

which was upheld in *Louisiana v. N.A.A.C.P.*, 366 U.S. 293 (1961) and *N.A.A.C.P. v. Alabama*, 357 U.S. 499 (1958). Furthermore, the right of Appellant to assert its employees' constitutional property rights in the instant case is on a parity with the right of the N.A.A.C.P. to assert its members' constitutional rights in *N.A.A.C.P. v. Alabama*, *supra*, and *Louisiana v. N.A.A.C.P.*, *supra*.

The relief sought by Appellee in the instant case will destroy these very rights which the employees have attempted to assert by refraining from providing the union with their names and addresses. Such a destruction, in the face of the principal of *Babcock & Wilcox* and *May Company* that property rights shall not yield where alternative methods of communications are available, should not be sanctioned by this court.

D. Violation of the Statutory Rights of Appellant's Employees.

Section 7 of the National Labor Relations Act provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." (Emphasis added.)

The importance of employees' Section 7 rights is well stated in *Shoreline Enterprises of America v. N.L.R.B.*, 262 F. 2d 933 (5th Cir. 1959):

"This view disregards an important party at interest under the Act and beyond the Act—the rank-and-file employee."

* * * *

"The National Labor Relations Board is not just an umpire to referee a game between an employer and a union. It is also a guardian of individual employees. Their voice, though still and small, commands a hearing. The interest of a rank-and-file worker in selecting an economic representative having the power to fix wages and working conditions is no less important than a citizen's interest in selecting a political representative. It is not necessary to decide that this interest is a right protected by the constitution. The National Labor Relations Act vests the Board with discretionary authority to conduct a fair election—fair for individual employees, as well as for the Company or for the Union."

* * * *

"The Court has great respect for the National Labor Relations Board in its zealous, fairhanded administration of the Act. In this case, however, Board agents nodded when they should have been alert and active. Individual rank-and-file employees, caught in the toils of selfish complexities of honest company-union negotiations, are entitled to look to the Board for protection of their rights." (262 F. 2d at 944-946.)

In the instant case the facts are clear and without contradiction that each of Appellant's employees was given the simple opportunity to provide their names and addresses to the Board's Regional office.

Two employees *exercised* their Section 7 rights to furnish their names and addresses to the union. The remaining employees *exercised* their Section 7 rights to "refrain" from any such activity by refraining from furnishing their names and addresses to the union. By so refraining, each such employee plainly, clearly and unequivocally manifested his desire to be free from the following union conduct:

1. Repeated personal visits at day or night by persistent union organizers which are disruptive of home and family life;
2. Repeated telephone calls at day or night by union organizers which are equally disruptive of home and family life;
3. Repeated mailings which are an unwelcome inconvenience.

The significance of freedom from such conduct is well expressed by the United States Supreme Court in *Breard v. Alexandria*, 341 U.S. 622 (1951):

"Unwanted knocks on the door by day or night are a nuisance or worse to peace and quiet." (341 U.S. at 626-27.)

Appellee in the instant case, contrary to the admonition in *Shoreline Enterprises, supra*, is attempting to disregard the employees' clearly expressed desires to avoid these intrusions. Thus, Appellee is acting squarely in disregard of the provisions of Section 7 of the Act and this court should not sanction such conduct. Otherwise stated, the Board *Excelsior* rule as applied to this case is contrary to the provisions of Section 7 of the Act, and should *not* be enforced.

IV.

Conclusion.

Appellant's motion to dismiss, or in the alternative, its motion for summary judgment should have been granted for the following reasons which have been fully discussed in this memorandum:

1. The District Court was without jurisdiction to grant the relief requested, in that:

a. Section 11(1) of the Act only authorizes the issuance of an order requiring the production of *evidence* touching a matter under investigation or in question, and the documents sought by plaintiff do not constitute such evidence;

b. The jurisdiction of the District Court is limited to enforcement of valid rules or orders of the Board and the attempted application of the *Excelsior* doctrine in the instant case is invalid and contrary to statute;

c. The provisions of 28 U.S.C. Section 1337 do not grant any general jurisdiction to this court where the National Labor Relations Act has expressly and specifically limited its jurisdiction.

2. The attempted application of the *Excelsior* doctrine to this case is squarely contrary to the Appellant's and its employees' constitutional and statutory rights.

Dated: November 16, 1967.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID A. MADDUX

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRITISH AUTO PARTS, INC.,

Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

On Appeal from an Order
of the United States District Court for the
Central District of California

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FILED

FEB 13 1968

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FEB 21 1968

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,883

BRITISH AUTO PARTS, INC.,

Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

On Appeal from an Order
of the United States District Court for the
Central District of California

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This case is here on appeal from an order (R. 102-103),¹ of the United States District Court for the Central District of California granting the Board's application for enforcement of

¹ "R." refers to the transcript of record.

a subpoena *duces tecum* directed to British Auto Parts, Inc. ("the Company") pursuant to Section 11(2) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 *et seq.*). In the alternative to its application for subpoena enforcement and as the second count of its complaint, the Board sought issuance of a mandatory injunction under 28 U.S.C., Sec. 1337, directing the Company to comply with an election rule promulgated by the Board pursuant to Section 9(c) of the Act. The jurisdiction of this Court is invoked under 28 U.S.C., Secs. 1291 and 1294.

A. Proceedings before the Board

On March 17, 1966, the Union² filed a petition pursuant to Section 9(c)(1) of the Act, seeking to represent a unit of the Company's employees at its plant in Gardena, California (R. 94; 7a). On April 12, 1966, the Regional Director approved a stipulation for Certification upon Consent Election entered into by the Company and the Union providing for the conduct of a consent election in accordance with the Act, "the Board's Rules and Regulations, and the applicable procedures and policies of the Board" (R. 94; 7a-7b).

One of the Board's election rules in effect at the time the parties entered into the stipulation for a consent election requires that an employer file with the Regional Director a list of the names and addresses of all its employees eligible to vote in the representation election within 7 days after the Regional Director's approval of a consent election agreement or after the close of the determinative payroll period for

² General Warehousemen, Local Union No. 598, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

eligibility purposes, whichever is later (R. 7g). The Regional Director then makes the list available to all parties in the representation proceeding in order to promote the communication of election issues to the employees and to aid in challenging the ballots of employees believed to be ineligible to vote (R. 7h-7l). An employer's failure to file the required list of employee names and addresses constitutes grounds for setting aside the election whenever proper objections are filed (R. 7g).

On April 19, 1966, the Company filed with the Regional Director an election eligibility list containing the names of its employees, but omitting their addresses as required by the rule (R. 95). On May 2, 1966, an election was conducted in which 3 employees voted for the Union and 4 employees voted against (*Ibid.*). The Board, however, sustained the Union's objection to the election based on the Company's refusal to furnish the required list, set the election aside, and directed that another election be held³ (R. 95; 7r-7y).

On August 4, 1966, the Regional Director notified the Company that the second election was to be held on September 12, and requested that a list of the employees' names and addresses be filed no later than August 11, 1966 (R. 95; 7y). The Company again failed to file the list, and at the request of the Union, the election was postponed (R. 95). On October 3, the Regional Director issued a subpoena *duces tecum* directing the Company to provide the Regional Director with the Company's personnel and payroll records or, in lieu thereof, with the required list (R. 96; 72). The Company, however, refused to comply with the subpoena or otherwise furnish the list.

³ The Board's order (R. 7t-7w) is reported at 160 NLRB No. 40.

B. Proceedings in the District Court

The Board filed a complaint in the District Court for enforcement of the subpoena, or, alternatively, for a mandatory injunction directing the Company to comply with the Board's rule (R. 1-7). Jurisdiction was predicated on Section 11(2) and 9(c) of the Act and on 28 U.S.C., Sec. 1337. The District Court issued findings of fact and conclusions of law on March 31, 1967, holding that it had jurisdiction both to enforce the Board's subpoena and to issue a mandatory injunction compelling direct obedience with the rule. Accordingly, on the same date, the Court entered an order compelling production of the materials sought in the subpoena and required by the rule (R. 93-103).

ARGUMENT

I.

THE *EXCELSIOR* RULE IS VALID AND PROPER

A. Reasons for the Board's Rule

On February 4, 1966, the Board issued its decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (R. 7c-7q), promulgating a new election rule requiring employers to file with the Board's Regional Director, prior to the conduct of a representation election, a list of the names and addresses of the employees eligible to vote in the election and providing that the Regional Director shall then make the list available to all parties to the proceeding (R. 7g-7h).

The considerations that led the Board to adopt the *Excelsior* rule are set forth in its decision (R. 7h-7l). In discharging the trust delegated by Congress in Section 9 of the Act, the Board recognized its obligation "to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice" (R. 7h). See *General Shoe Corporation*, 77 NLRB 124, 126-127. The Board observed that one of the elements that "undoubtedly tends to impede such a choice is a lack of information with respect to one of the choices available"; in other words, that "an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice" (R. 7h). See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 46, 92 (1964).

Under its previous rules, the Board determined, employees frequently did not have an effective opportunity to hear the arguments on all sides before being called upon to cast their votes in a representation election. The Board found that "as a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation" (R. 7h-7i). But the Board found that a labor organization, lacking these advantages, "has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a

result, employees are often completely unaware of that point of view" (R. 7i).⁴

Assuming the existence of other means by which a labor organization "might be able to communicate with a substantial portion of the electorate," the Board held that "access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters" (R. 7h-7i). "In other words," the Board stated, "by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against union representation" (*ibid.*).

The Board further found that employee names and addresses are not readily available from sources other than the employer. Although the "names of some employees may be secured with the assistance of sympathetic fellow employees, . . . this method may not yield the names and addresses of a major proportion of the total employee complement . . . in a large plant or store, where many employees are unknown to their fellows" (R. 7i).⁵ Moreover, there are frequently

⁴ The Board noted that union organizers normally have no access to plant premises (*N.L.R.B. v. Babcock and Wilcox*, 351 U.S. 105) and that, under the Board's former election rules, labor organizations were not entitled to a list of the employees' home addresses (R. 7h). Although the Board's former rules required that "an employer, shortly before an election, make available for inspection by the parties and the Regional Director a list of employees claimed by him to be eligible to vote in that election," there was "no requirement that this list contain addresses in addition to names" (R. 7g).

⁵ For example, the Board noted that in *May Department Stores Co.*, 136 NLRB 797, 808, enf. denied, 316 F. 2d 797 (C.A. 6), after some 20 months of organizational effort, the union possessed names and addresses of only 1,250 out of approximately 3,000 eligible voters (R. 7i, n. 11).

employees who are temporarily absent from the employee complement (on layoff, sick leave, leave of absence, or military leave), eligible to vote yet unknown to their fellow employees, and still others who are known to their fellows only by first names and nicknames. "Finally, all the foregoing difficulties are compounded by the more or less constant turnover in the employee complement of any employer" (R. 22-23). See *Employment and Earnings Statistics for the United States, 1909-66*, pp. 45-48 (BLS Bulletin 1312-4).

"In sum," the Board concluded, "not only does knowledge of employee names and addresses increase the likelihood of an informed employee choice for or against representation, but, in the absence of employer disclosure, a list of names and addresses is exceedingly difficult if not impossible to obtain. Accordingly, as we have stated, we shall in the future regard an employer's refusal to make a prompt disclosure of this information as tending to interfere with prospects for a fair and free election" (R. 7j).

In addition, the Board determined that its new rule would reduce the number of challenged ballots and challenge proceedings by promoting advance settlement of questions of voting eligibility and by obviating the need for union challenges based solely on ignorance of the voter's identity (R. 7k-7e). Thus, the Board also concluded that "the requirement of prompt disclosure of employee names and addresses will further the public interest in the speedy resolution of questions of representation" (R. 7l).⁶

⁶ In fiscal 1966, the Board closed 8,324 representation proceedings in which elections were conducted and the results certified. See *31st Annual Report of the NLRB, 1966*, p. 203 (Table 11A).

B. The Board's adoption of the *Excelsior* rule is within its broad statutory authority to establish reasonable rules and procedures for the conduct of representation elections.

Some 20 years ago, the Supreme Court was asked to determine the validity of the Board election rule that excludes as untimely post-election challenges to the eligibility of voters. The Court prefaced its determination with the following statement (*N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324, 330-331):

As we have noted before, Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees In carrying out this task, of course, the Board must act so as to give effect to the principle of majority rule set forth in Section 9(a), a rule that "is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions." . . . It is within this democratic framework that the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily. [Citations to cases and legislative history omitted.]

The Court found that the Board's rule was "a justifiable and reasonable adjustment of the democratic process," which had its reflection in the procedures followed in other electoral contests (*id.*, at 333). Thus, the Court stated (*id.*, at 331):

Indeed, unless such adjustments are made, the democratic process may be perverted and the

election may fail to reflect the will of the majority of the electorate. One of the commonest protective devices is to require that challenges to the eligibility of voters be made prior to the actual casting of ballots, so that all uncontested votes are given absolute finality. In political elections, this device often involves registration lists which are closed some time prior to election day; all challenges as to registrants must be made during the intervening period or at the polls.

Thereafter, it is too late This rule is universally recognized as consistent with the democratic process. And it is generally followed in corporate elections. The Board's adoption of the rule is therefore in accord with the principles which Congress indicated should be used in securing the fair and free choice of collective bargaining representatives.

Applying these standards, the Courts of Appeals for the Fourth and Seventh Circuits have recently upheld the validity of the Board's *Excelsior* rule. *N.L.R.B. v. Hanes Hosiery Division, Hanes Corp.*, 384 F. 2d 188 (C.A. 4), pet. for cert. pending, No. 982, this term; and *N.L.R.B. v. Rohlen*, 385 F. 2d 52 (C.A. 7).⁷ As the Court observed in *Rohlen*, "The

⁷ Several district courts, including the court below, have also affirmed the validity of the *Excelsior* rule. *N.L.R.B. v. Wyman-Gordon Co.*, 270 F. Supp. 280 (D. Mass.), appeal pending (No. 7,000, C.A. 1); *N.L.R.B. v. Teledyne, Inc.*, 66 LRRM 2408 (N.D. Cal.), appeal pending, (No. 22,354, C.A. 9); *N.L.R.B. v. Mid-States Metal Products Co.*, 64 LRRM 2060, 2187 (E.D. Mich.); *N.L.R.B. v. Beech-Nut Life Savers, Inc.*, 274 F. Supp. 432 (S.D. N.Y.); *Swift & Co. v. Solien*, 274 F. Supp. 953 (E.D. Mo.); *N.L.R.B. v. Q-T Shoe Co.*, 67 LRRM 2356 (D. N.J.).

two-pronged purpose of the rule is to make certain that employees are able to exercise an informed and reasoned choice after hearing all sides of the question concerning the desirability of union representation and to eliminate the time-consuming process of investigating challenges to voter eligibility on the eve of elections solely because of a lack of knowledge of voters' identity." 385 F. 2d at 55. The rule is thus consonant with procedures long approved and enforced in other electoral contests. *Hanes, supra*, 384 F. 2d at 191.

c. The Company's claim that the *Excelsior* rule is arbitrary and capricious is without merit

Turning to the "arguments against imposing a requirement of disclosure" — arguments which the Company repeats here — the Board determined that they "are of little force, especially when weighed against the benefits resulting therefrom" (R. 71).

The Company undertakes to attack *Excelsior* on behalf of its employees, alleging that the rule invades their privacy. The Company claims that most of its employees asserted a desire to be left alone by failing to send their names and addresses to the Regional Director after the election had been directed, despite the fact that it had supplied them with stamped, pre-addressed envelopes for that purpose (Br. 27-28). Such inaction by the employees, however, cannot properly be construed as an affirmative declaration that they do not want the union to know who they are and where they live.

In any event, their failure to send in their names and addresses is immaterial. Many employees who would not themselves take the initiative in securing literature from a union

because of inertia, fear of employer reprisal, or an initial disposition to vote against union representation, are nonetheless interested in hearing what a union has to say in the period just before an election in which they are directly concerned. The Board's rule simply gives unions an opportunity to reach employees; it does not compel employees to read union literature mailed to them or to discuss unions with fellow employees or union representatives who might come to their homes for that purpose. The statutory good served by giving employees an opportunity to become more informed about the choice before them outweighs the minor inconvenience caused those employees who are determinedly disinterested in the election and who must, therefore, throw away a few additional items of unwanted mail or turn away an unwelcome visitor.⁸ As stated by the Court in *Swift & Co. v. Solien*, *supra*, 274 F. Supp. at 958:

[The employer] attempts to champion and protect what it deems to be the right of its employees to make "uninformed choices." Significantly, it is the employer, not the employees, who attempts to . . . protect that "right." The employees may well have

⁸ Cf. *Wheeler v. Sorenson Mfg. Co.*, 65 LRRM 2408, 2409-2410 (Ky. App.), holding that an employer did not violate his employee's right of privacy by printing and distributing to other employees photographs of her pay check, showing the number of hours she worked, gross wages, deductions, and "take home" pay, in the course of justifying his pay scales and urging employees not to support a union; and *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880 (S.D. N.Y.), dismissing an action brought on behalf of New York motor vehicle registrants alleging that their right of privacy was invaded by sale of the state registration records to the "highest responsible bidder" for commercial purposes.

such a right (as by voluntarily closing their eyes, ears and doors to proffered information), but the choice of whether to exercise that right should be theirs, not the employer's. It is, of course, true that the *Excelsior* rule, which facilitates communication with the employees does not guarantee a fully informed electorate any more than the availability of water to a horse will assure that he will drink, but the Board has the right to be concerned that the decision by the employees should, if possible, be an informed and reasoned one.⁹

Nor is there substance to the contention that the *Excelsior* rule is invalid because it subjects employees to the danger of harassment and coercion in their homes. As the Board stated in *Excelsior* (R. 7m):

We cannot assume that a union, seeking to obtain employees' votes in a secret ballot election, will engage in conduct of this nature; if it does, we shall provide an appropriate remedy. [Footnote omitted.] We do not, in any event, regard the mere possibility that a union will abuse the

⁹ See also, *N.L.R.B. v. Wolverine Industries Division, Mid-States Metal Products, Inc.*, *supra*, 64 LRRM at 2061 ("It is true that the members of the unions . . . may go to the homes of the employees and try to sell them on their positions. I would hate to say that I had so little faith in the intelligence of the average man that I should close his ears to that kind of approach or make it difficult for others to reach him in that way. I think your average citizen is a pretty . . . intelligent, independent and courageous man, and if he doesn't want to hear what the UAW or UMW has to say, he can quickly turn his back").

opportunity to communicate with employees in their homes as a sufficient basis for denying this opportunity altogether. See *Martin v. City of Struthers*, 319 U.S. 141; *Staub v. City of Baxley*, 335 U.S. 313.

The Supreme Court held in the cases cited that a community that attempts to protect its citizens from door-to-door solicitations and distributions of literature by banning or placing prior restraints on this conduct, acts in violation of the First Amendment. In so holding, the Court pointed out that the opportunity to make such visits is important to the free expression of ideas, that some people welcome these visits, and that those who feel otherwise are free to turn the visitors away and have the protection of the law in doing so (319 U.S. at 143-149). The Company's attempt to exercise this privilege in behalf of its employees by denying the unions access to them is surely entitled to no more deference than the efforts of communities to protect their citizens from "nuisance" visits in the case cited above.¹⁰ See also *Public Utilities Commission v. Pollak*, 343 U.S. 451.

¹⁰ In *N.A.A.C.P. v. Alabama*, 357 U.S. 449, cited by the Company (Br. 25-26), the Supreme Court held that "compelled disclosure of [NAACP's] Alabama membership is likely to affect adversely the ability of [NAACP] and its members to pursue their collective effort to foster beliefs they admittedly have the right to advocate, in that it may induce members to withdraw from [NAACP] and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure [in a hostile atmosphere]." 357 U.S. at 462-463. Compelled production of the *Excelsior* list properly gives rise to none of these fears, for such a list simply identifies those employed by the Company and tells nothing about their beliefs or associations.

The Company also contends that to require it to comply with the *Excelsior* rule would deprive it of a contract right to keep its employees' addresses confidential (Br. 28-29). Initially, the record fails to support the Company's claim to such a contract right. The Company requires all of its employees to fill out an employment application form containing a printed provision assuring the employee that all information in the form will remain confidential.¹¹ Thus, confidentiality is not bargained for by the employees, but rather imposed by the Company. But even if confidentiality were the bargained-for contract right of the employees, it is clear that the Company lacks sufficient standing to champion such a right in its employees' behalf. See, e.g., *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459.

In any event, assuming the Company has standing to champion its employees' "contract right" to confidentiality, such a defense must be rejected since, as the District Court found (R. 99):

The employees' interest [in confidentiality is] insubstantial and subject to abridgment by a clearly proper administrative rule promulgated for purposes of holding a fair election. See, e.g., *Addyston Pipe Steel Co. v. United States*, 175 U.S. 211, 228 (1899).¹²

¹¹ It is a basic rule of evidence that the mere fact that a communication is made in confidence does not create a recognized privilege against disclosure. See 8 *Wigmore Evidence*, Sec. (3d ed., 1940), and cases there cited.

¹² See also, *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 337.

Equally without merit is the contention that employees will be deprived of their statutory right to refrain from union activities if union proponents are given an opportunity to visit employees in their homes before the election (Br. 29-31). An employee is not deprived of his right to refrain from union activity because a union is given the opportunity to urge him to vote for union representation, any more than he is deprived of his right to engage in union activity when his employer urges him to vote against the union. So long as the employee is not subjected to intimidating pressures in his contacts with employer or union, the discussion of election issues forwards rather than hinders the ultimate expression of employee free choice. See *Mead-Atlanta Paper Co.*, 120 NLRB 832, 834; *Tuttle & Kift*, 122 NLRB 848-849; *Crane Carrier Corp.*, 122 NLRB 206, 207-208. As the Board stated in *Excelsior* (R. 7m), "an employee's failure to provide a union with his name and address . . . is not, as we view it, an exercise of the Section 7 right to refrain from union activity. Rather, in the context with which we are here concerned — a Board-conducted representation election — an employee exercises this right by voting for or against union representation."

Thus, the purpose of the *Excelsior* rule is to enable employees to hear the arguments on all sides so that they may make a "more fully informed and reasoned choice" in Board elections (R. 7h). If hearing the Union's arguments leads a majority of the employees to vote for union representation, then that result is the proper one under democratic election processes. It is compelled, not by the Board's election rule, but by employee free choice. What the Company seeks to preserve, in the name of employee rights, is the advantage it enjoys in being able to make antiunion speeches to the employees on the job and to mail campaign literature to them at home, while denying the Union the opportunity of similar communications through the mails or home visits.

The Company also urges that *Excelsior* should be rejected because the Board determined that an employer's failure to make prompt disclosure of employee names and addresses tends to interfere with prospects for a fair and free election without establishing as a predicate for such a determination that no alternate channels of communication are open to the Union. Contrary to the Company's contention, the decisions of the Supreme Court in *N.L.R.B. v. Babcock & Wilcox*, 351 U.S. 105, and *N.L.R.B. v. United Steelworkers (Nutone, Inc.)*, 357 U.S. 357, require no such result. In those cases, the right of union representatives to organize on plant premises and of employees to distribute literature in the plant and engage in union activities during working time was measured against the employer's significant interest in controlling the use of his property and the working time of his employees. Accordingly, the existence of alternate means of communication with employees was deemed a relevant consideration in striking the balance between these substantial, conflicting interests.¹³

"Here, as we have shown, the employer has no significant interest in the secrecy of employee names and addresses. Hence, there is no necessity for the Board to consider the existence of alternative channels of communication before requiring disclosure of that information." *Excelsior* (R. 7n).

The Board in establishing the *Excelsior* rule, noted that employers are assured of the opportunity to communicate

¹³ *May Department Stores Co. v. N.L.R.B.*, 316 F. 2d 797 (C.A. 6), may be similarly distinguished. That case "was also concerned with an employer's right to refuse access to its plant property. [There,] . . . the employer had addressed the employees on company premises and on company time. The union request in *May* approached a demand for 'equal time'. These facts are totally unrelated to those here [presented]." *N.L.R.B. v. Rohlen*, 274 F. Supp. 715, 718 (N.D. Ill.), affirmed, 385 F. 2d 52 (C.A. 7).

with the entire employee electorate in the plant and through the mails and that labor organizations, lacking these avenues of communication, have no such assurance. It was primarily to insure the employees access to the arguments of both sides prior to an election that the Board established the *Excelsior* rule, giving all election participants the means to reach all eligible voters. However, contrary to the Company's assertion, the Board's rule does not rest on the assumption that an imbalance of opportunity for communication exists in every case. On the contrary, the Board in *Excelsior* assumed that, on occasion, parties outside the employment relation might be able to communicate with the employees by various means without possessing their home addresses (R. 7i, 7n).¹⁴ But to guarantee full access, the Board established a rule of uniform application for expeditious settlement of questions of employee representation that gives all parties an opportunity to reach the entire electorate, without sacrifice of any substantial employer interest. Accordingly, "even assuming the availability of other avenues by which a union *might* be able to communicate with employees, . . . [the Board] may properly require employer disclosure of employee names and addresses so as to *insure* the opportunity of all employees to be reached by all parties in the period immediately preceding a representation election." *Excelsior* (R. 7n).

Moreover, even if the employer were assumed to have a legitimate interest in non-disclosure, the subordination of that interest required by the *Excelsior* rule would be limited to a situation in which employee interests in self-organization are shown to be substantial. For whenever an election is directed (the precondition to disclosure), the Regional Director has

¹⁴ The Board noted, however, the inadequacy of the channels of communication normally open to unions. See R. 71, n. 10.

found that a real question concerning representation exists.¹⁵ Thus, *Babcock* and *Nutone* may be distinguished from the instant case on the further ground that the opportunity to communicate sought there was not limited to situations in which employee organizational interests were substantial (R. 7n-7o).

Finally, both *Babcock* and *Nutone* dealt with the circumstances under which the Board might find an employer to have committed an unfair labor practice in violation of Section 8 of the Act. The resolution of that issue depends on considerations substantially distinguishable from those presented here in determining the reasonableness of the Board's holding that the disclosure of employee names and addresses is one of the "safeguards necessary to insure the fair and free choice of bargaining representatives by employees" under Section 9. *Excelsior*, quoting *N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324, 330 (R. 70). See *N.L.R.B. v. Shirlington Supermarket, Inc.*, 224 F. 2d 649, 652-653 (C.A. 4), cert. denied, 350 U.S. 914. As the District Court stated in *N.L.R.B. v. Rohlen*, *supra*, 274 F. Supp. 715, 718, affirmed, 385 F. 2d 62 (C.A. 7):

In addition, all of the above cases [*Babcock*, *Nutone*, and *May*] involved charges of unfair labor practices under Section 8 of the Act, and to find that the company was guilty of an unfair labor

¹⁵ The Regional Director's finding is dependent on a showing by the petitioning union that 30 percent of the eligible voters support it. A union would be ill-advised to petition for representation simply to obtain the *Excelsior* list; if it withdrew its petition after obtaining the list, it would face under Board rules a 6-month ban on the processing of another representation petition (R. 7n).

practice it was necessary . . . first to find that the company's conduct in denying access to its property "seriously impeded union organization." In determining whether organization was "seriously impeded," the availability of alternate means of communication was an important consideration. We are not concerned with an unfair labor practice, but rather how best the Board may carry out its responsibility to conduct and supervise a representation election. The availability of alternate means of communication should not prohibit the Board from establishing procedures more likely to guarantee an adequate and effective exchange of thought.

In sum, the Board decided in *Excelsior* to raise election standards by providing all participating parties with the means to reach all eligible voters. That determination was made in furtherance of objectives that Congress has entrusted to the Board alone. It was neither arbitrary nor capricious, but a valid and reasonable exercise of Board discretion, entitled to affirmance here.

II.

THE DISTRICT COURT PROPERLY ENFORCED THE BOARD'S SUB- POENA UNDER SECTION 11 OF THE ACT.

Section 11 of the Act provides in relevant part:

For the prupose of all hearings and investigations which, in the opinion of the Board, are necessary

and proper for the exercise of the powers vested in it by section 9 [certification of employee representatives] and section 10 [prevention of unfair labor practices] —

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses of the production of any evidence in such proceeding or investigation requested in such application

(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its members, agents or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question . . .

As noted above, when the Company continued in its refusal to comply with the Board's *Excelsior* rule, the Regional Director caused a subpoena *duces tecum* to be served on the

Company directing it to produce the company books and payroll records, or an eligibility list in lieu thereof, containing the names and addresses of all employees eligible to vote in the election (R. 96; 72). The Company petitioned to revoke the subpoena and the Board denied its petition (R. 96). Upon the Company's continued refusal to comply, the Board brought action in the District Court seeking enforcement of the subpoena in the first count of its complaint, pursuant to Section 11(2) of the Act (R. 2-7).

The "scope of permissible judicial inquiry in deciding whether such an application [for subpoena enforcement] should be granted or denied . . . is extremely limited." *N.L.R.B. v. C. C. C. Associates, Inc.*, 306 F. 2d 534, 538 (C.A. 2). Duly issued subpoenas are entitled to enforcement subject only to the requirements that the Board is acting within its statutory authority in a general class of proceeding that it is empowered to conduct, that the subpoena is not unreasonably burdensome, and that the information sought is not "plainly incompetent or irrelevant to any lawful purpose." *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509.¹⁶

¹⁶ See *N.L.R.B. v. C. C. C. Associates*, *supra*, 306 F. 2d at 538; *N.L.R.B. v. Friedman*, 352 F. 2d 545, 547 (C.A. 3); *D. G. Bland Lumber Co. v. N.L.R.B.*, 177 F. 2d 555, 557-558 (C.A. 5); *Hamilton v. N.L.R.B.*, 177 F. 2d 676, 677 (C.A. 9); *Cudahy Packing Co. v. N.L.R.B.*, 117 F. 2d 692, 694 (C.A. 10); *N.L.R.B. v. United Aircraft*, 200 F. Supp. 48, 50-51 (D. Conn.), *aff'd per curiam*, 300 F. 2d 442 (C.A. 2); *N.L.R.B. v. Gunaca*, 135 F. Supp. 790, 795-796 (E.D. Wisc.), *aff'd*, 230 F. 2d 542 (C.A. 7), vacated as moot, 353 U.S. 902. See also, *U.S. v. Powell*, 379 U.S. 48, 57-58; *Adams v. F. T. C.*, 296 F. 2d 861, 866 (C.A. 8); *U.S. v. Feaster*, 376 F. 2d 147 (C.A. 5), cert. denied, _____ U.S. _____, 88 S. Ct. 237.

The Board's statutory authority under Section 9 to conduct representation investigations, regulate elections, and certify election results is unquestionable, as is its power to subpoena documents in aid of these authorized functions. *N.L.R.B. v. Duval Jewelry Co.*, 357 U.S. 1; *N.L.R.B. v. Northern Trust Co.*, 148 F. 2d 24, 27 (C.A. 7), cert. denied, 326 U.S. 731. The subpoena sought to be enforced in the present case was issued in a properly instituted representation proceeding to aid the Board in determining the question of representation presented, under conditions designed to promote a "free and reasoned" employee choice. The ultimate question to be resolved in the proceeding before the Board is whether an informed employee electorate will select one of the participating unions as collective bargaining representative in a fair election. A list of the names and addresses of employees eligible to vote in the election, which is to be made available to all parties for the purpose of communicating election issues and determining eligible voters, is clearly relevant to the resolution of that ultimate issue. *N.L.R.B. v. Rohlen*, *supra*, 385 F. 2d at 57 (C.A. 7); *N.L.R.B. v. Hanes Hosiery*, *supra*, 384 F. 2d 188.

The Company challenges the District Court's enforcement of the subpoena on the ground that the employees' names and addresses are not evidence within the meaning of Section 11 of the Act. But the term "evidence" under this section of the statute has not been limited to formal proof of disputed facts presented in a trial-type hearing. Rather, Section 11 has been broadly construed to permit the Board to subpoena data reasonably relevant and helpful in the performance of its statutory duties at the investigative, as well as at the hearing, stage of its proceedings. The Board, in its investigation of questions of representation and supervision of elections, has been permitted to subpoena payroll and employment records to determine, *ex parte*, such internal

administrative matters as whether the employees had a sufficient interest in union representation to warrant the holding of an election, and more generally, “[a]s an aid to the Board in conducting the election and determining who were eligible to vote” (*Cudahy Packing Co. v. N.L.R.B.*, 117 F. 2d 692, 693 (C.A. 10), affirming, 34 F. Supp. 53, 56, 59 (D. Kan.)). See *N.L.R.B. v. Northern Trust Co.*, 56 F. Supp. 335, 336 (N.D. Ill.), aff’d, 148 F. 2d 24 (C.A. 7), cert. denied, 326 U.S. 731; *N.L.R.B. v. Menaged*, 193 F. Supp. 135, 136-137 (D. Md.); *N.L.R.B. v. New England Transportation Co.*, 14 F. Supp. 497, 498, 499 (D. Conn.).¹⁷

Moreover, both the language of the statute and the legislative history of Section 11 warrant the conclusion that Congress intended to give the Board access to all records relevant to the performance of its delegated function of investigating questions of representation under Section 9 of the Act. The preamble of Section 11 provides that the subpoena powers enumerated shall be “for the purpose of all hearings and investigations which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10” This

¹⁷ Cf. *N.L.R.B. v. Groendyke Transport, Inc.*, 372 F. 2d 137, 141-142 (C.A. 10), cert. denied, 387 U.S. 932, where the court held that the Board may conduct a representation election by mail ballot. As the District Court observed, “Implicit in that decision is the holding that the Board may require an employer to furnish the addresses of its employees for the purpose of conducting a representation election.” (R. 5).

language is quoted in the House Committee reports, which state, with respect to the proposed Section 11:¹⁸

For the purpose of all hearings and investigations which in the opinion of the Board are necessary and proper for the exercise of the powers vested in it by section 9 and section 10, dealing with investigations of questions concerning the representation of employees and unfair labor practices, there is granted in section 11 the subpoena powers typically provided for similar administrative bodies, without which their work would be ineffectual. The section grants no roving commission, but is limited to the exercise of powers and functions embodied in sections 9 and 10.¹⁹

¹⁸ II *Legislative History of the NLRA, 1935*, (G.P.O., 1935), pp. 2932, 2978-2979, 3076; H. Rept. No. 969 on H.R. 7978, p. 22; H. Rept. No. 972 on S. 1958, p. 22; H. Rept. No. 1147 on S. 1958, p. 25; 74th Cong., 1st Sess.

¹⁹ See also I *Leg. Hist. NLRA, 1935*, p. 1367, Comparison of S. 2929 and S. 1958, Memorandum of Mar. 11, 1935, 74th Cong., 1st Sess., p. 40:

"S. 1958 [subsequently enacted as the NLRA] provides, also, that agents of the Board may have access to, for the purpose of examination and the right to copy, evidence relating to matters under investigation. There is an identical provision in the Federal Trade Commission Act, section 9, . . . [i]n the Interstate Commerce Act (49 U.S. C. Sec. 20(5)), and in the Communications Act (sec. 220(c)). There are similar provisions in section 2(9) of the Railway Labor Act of 1934 ('the Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may

(continued)

As the Seventh Circuit observed in *Rohlen, supra*, 385 F. 2d at 57:

The crucial words [in the text of Section 11(2)] are "to produce evidence . . . or . . . give testimony touching the matter under investigation or in question." From this language, it is clear that a party can be requested, by virtue of a subpoena, "to produce evidence" concerning a "matter under investigation." When this rather obvious observation is coupled with the commonly accepted function of an investigation, the gathering of facts and information, the company's position becomes untenable. The company would read the words just quoted without the phrase "under investigation." A more appropriate reading would place primary emphasis on those words. Thus, if the material subpoenaed touches a matter under investigation, it is within the scope of section 11(2) even though the material may not be considered "evidence" as the term is employed in the courtroom.

Moreover, the list of employees names and addresses is evidence relating to a "matter . . . in question." Even if we adopt the orthodox view that evidence tends to prove or disprove the existence of a

19 (continued)

be deemed necessary by its to carry out the purposes and provisions of this paragraph") and section 4 of the Executive order of June 28 establishing the National Steel Board ("the Board shall have access to such payrolls and other documents as will enable the Board to prepare and certify lists of employees eligible to vote in elections")."

disputed fact or something in issue, the “something in issue” in a representation proceeding under section 9 is the employee group-preference. An *Excelsior* list, by facilitating a fully informed electorate, is evidence which aids in the establishment of that group-preference.²⁰

As *U. S. v. Morton Salt*, 338 U.S. 632, makes clear, the time is now past for judicial resistance to the full range of subpoena powers delegated by Congress to administrative agencies in aid of their statutory functions: “We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the colorful and nostalgic slogan ‘no fishing expeditions’ ” (338 U.S. at 642). But “[r]estrictions on subpoena validity were subsequently relaxed as Congress continued to delegate broad investigatory authority and courts grew more familiar with the administrative process. Thus, an agency need no longer show a probable violation before issuing a subpoena; the investigation merely must relate to some congressionally delegated function” *Resisting Enforcement of Administrative Subpoenas Duces Tecum*, 69 Yale L. J. 131, 133 (1959). Accordingly, the court below properly construed the term “evidence” in Section 11 to include payroll and employment records relevant and useful to the Board in its

²⁰ The cases cited *supra*, n. 7, are also in accord. Contra: *N.L.R.B. v. Montgomery Ward*, 64 LRRM 2061 (M. D. Fla.) (not appealed on grounds of mootness); *N.L.R.B. v. Q-T Shoe Co.*, 67 LRRM 2356, 2359-2360 (D.N.J.) (notice of appeal to be filed when judgment is entered).

resolution of questions of representation pursuant to Section 9 of the Act.²¹

As a corollary to its contention that the Board's subpoena *duces tecum* calls for the production of records that are not evidence, the Company asserts that the subpoena is not entitled to enforcement because the Board intends to make the information revealed by the subpoena available to the union (Br. 12). A similar contention was made in *N.L.R.B. v. Friedman*, 352 F. 2d 545 (C.A. 3), where it was urged in defense to a Board subpoena that the Board proposed to

²¹ The Seventh Circuit observed in *Rohlen*, *supra*, 385 F. 2d at 58, that the more restrictive view of an administrative agency's subpoena powers expressed in *F. T. C. v. American Tobacco Co.*, 264 U.S. 298, has been obliterated by subsequent decisions of the Supreme Court. In any event, the Company's citation of *F. T. C. v. American Tobacco* is inapposite (Br. 13). The Court did not hold there that the purpose for which the administrative agency sought to compel the production of documents put those documents beyond a technical definition of the word "evidence," as the Company would suggest. Rather, the Court held that the subpoena was unenforceable because it was too broad and much of the material covered was irrelevant (264 U.S. at 306). No similar attack can be made on the breadth of the Board's subpoena in the instant case. (*Cf. Goodyear Tire & Rubber Co. v. N.L.R.B.*, 122 F. 2d 450 (C.A. 6), cited by the Company (Br. 12), an early decision placing heavy reliance on *American Tobacco*, and distinguishable on the same basis.) Finally, it should be noted that the legislative history of the Act indicates that Congress used the term "evidence," rather than "documentary evidence," in defining the subpoena powers of the Board because of the narrow construction the latter term had received in such decisions as *American Tobacco* (1 Leg. Hist. NLRA, 1935, p. 1369, Comparison of S. 2929 and S. 1958, Memorandum of Mar. 11, 1935, 74th Cong., 1st Sess., p. 41). Referring specifically to that decision, the cited memorandum concluded that the "adjective 'documentary' is therefore very restrictive and would exclude the type of records such as pay-rolls, which the Board would have most need of" (*ibid.*).

consult with union representatives in the analysis of the company records subpoenaed, and thus to give the union access to data that the company wished to keep confidential. The Court rejected this defense, stating (at 548):

No trial or administrative proceeding could pursue truth effectively if an absolute right to keep private matters confidential was conceded to all parties involved.

Appellants' vague and unspecific contention that confidential matter will be revealed is similar in scope to the one made in *F. C. C. v. Schreiber* [381 U.S. 279] There, the Supreme Court found an order forbidding disclosure of certain information to be invalid because made "without any showing that secrecy is justified" There, as here, "the naked assertion of possible . . . injury does not establish . . . [an abuse of] discretion in declining to accord confidential treatment."

For many years the Board has required "that an employer, shortly before an election, make available for inspection by the parties and the Regional Director a list of employees claimed by him to be eligible to vote in that election" (R. 7g). The required eligibility lists have of necessity been made available to participating unions to enable them to identify and challenge ineligible voters. Only the element of employee addresses has been added to the required lists under the *Excelsior* rule, to promote full communication of election issues and timely authentication of voting eligibility. To be sure, the Board has thus enlarged the purpose for which access to eligibility lists is granted, but this is properly a subject for Board determination, not unilateral employer control.

The Company has failed to advance any substantial, legitimate interest of its own that would be compromised by making employee names and addresses available to all parties to the election proceeding; and the Board properly found that the forwarding of statutory objectives achieved by *Excelsior* would warrant the overriding of such minimal employer interests in secrecy as might exist, in favor of the public interest served by disclosure. *Cf. F. C. C. v. Schreiber*, 381 U.S. 279.

In sum, the Board's subpoena is entitled to enforcement because it was issued in a statutorily authorized proceeding to carry out objectives that Congress has entrusted to the Board, the information sought is relevant to achieving the statutory objectives, Section 11 has been broadly construed to include all such information, and no substantial employer interest has been presented that would warrant overriding of the statutory objectives served by disclosure.

III.

THE DISTRICT COURT PROPERLY FOUND THAT IT ALSO HAD JURISDICTION TO ENFORCE THE BOARD'S RULE UNDER 28 U.S.C., Sec. 1337.

As an alternative to its request for subpoena enforcement, the Board asked the District Court to issue a mandatory injunction directing the Company to file the required list of employee names and addresses in compliance with the Board's *Excelsior* rule. The second count of the complaint was brought under 28 U.S.C., Sec. 1337, which provides that the district courts shall have jurisdiction "of all suits and proceedings under any law regulating commerce." This provision vests the district courts with jurisdiction to grant injunctive relief to aid administrative agencies in carrying out their

statutory functions despite the absence of any express provision authorizing such relief in their respective enabling acts. See. *Capital Service, Inc. v. N.L.R.B.*, 347 U.S. 501, 504; *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 521-524, 526-527 (dissenting opinions); *N.L.R.B. v. New York State Labor Relations Board*, 106 F. Supp. 749, 752-753 (S.D. N.Y.) and cases there cited; *U.S. v. Feaster*, 330 F. 2d 671, 674, 376 F. 2d 147, 148-149 (C.A. 5), cert. denied, ____ U.S. ____, 88 S. Ct. 237; *Federal Maritime Commission v. Atlantic & Gulf/Panama Canal Zone*, 241 F. Supp. 766, 774-775 (S.D. N.Y.) and cases there cited. See also *Walling v. Brooklyn Braid Co.*, 152 F. 2d 938, 940-941 (C.A. 2).

The question before the court in this type of case is "Whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted" (*Walling v. Brooklyn Braid*, *supra*). Thus, it is well settled that the general equitable jurisdiction of the district courts extends to actions brought to carry out the public purpose despite the absence of any express statutory authority, for "there is inherent in the Courts of Equity a jurisdiction to * * * give effect to the policy of the legislature."²² See *I. A. M. v. Central Airlines, Inc.*, 372 U.S. 682, 690-696; *Texas & N. O. R. v. Ry. Clerks*, 281 U.S. 548, 569-570; *In re Debs*, 158 U.S. 564, 577, 584; *Shafer v. U. S.*, 229 F. 2d 124, 128 (C.A. 4), cert. denied, 351 U.S. 931; *Florida East Coast Ry. Co. v. U. S.*, 348 F. 2d 682, 684-685 (C.A. 5), aff'd on other grounds, 384

²² *Reich v. Webb*, 336 F. 2d 153, 158 (C.A. 9), cert. denied, 380 U.S. 915, quoting *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 291-292. See also *Los Angeles Trust Deed & Mortgage Exchange v. S.E.C.*, 285 F. 2d 162, 181-182 (C.A. 9) and authorities there cited, cert. denied, 366 U.S. 919.

U.S. 238, 242 n. 4. See also *United States v. West Virginia*, 295 U.S. 463, 473; *Sanitary District v. United States*, 266 U.S. 405, 425-426. Applying these principles, the Fourth Circuit held in *N.L.R.B. v. Hanes Hosiery Division, Hanes Corp.*, 384 F. 2d 188, that the *Excelsior* rule is directly enforceable by injunctive relief based on 28 U.S.C. 1337. Accord: *N.L.R.B. v. Mid-States Metal Products Co.*, *supra*, 64 LRRM 2187 (alternate finding); *N.L.R.B. v. Rohlen*, 64 LRRM 2168 (N.D. Ill.) affirmed on alternate grounds, 385 F. 2d 52 (C.A. 7)²³

In its brief (pp. 14-19) the Company asserts that general grants of jurisdiction such as that involved in Section 1337 are not applicable where there is involved a specific regulatory statute with enforcement procedures (Br. 14-19). If the Company means that the Board must follow the procedures for judicial enforcement provided for in the Act where applicable, its assertion is both irrefutable and irrelevant. For example, the Board obviously could not ignore the provisions for judicial enforcement in the courts of appeals under Section 10(e) of the Act, and instead seek to enforce its unfair labor practice orders in the district courts under 28 U.S.C., Sec. 1337. But that has nothing to do with this case, for the Act does not establish a procedure under which the Board may secure direct enforcement of its election rules. Consequently, no conflict exists here between the statutory enforcement procedures and the Board's resort to the District Court under Section 1337. And the cases cited above clearly refute the Company's converse suggestion (Br. 16) that the absence of a statutory provision for

²³ Contra: *N.L.R.B. v. Q-T Shoe*, *supra*, 67 LRRM at 2360-2361.

specific judicial relief warrants the inference that the agency is precluded from invoking the general equitable jurisdiction of the district courts in effectuation of its statutory powers and responsibilities. See, in particular, *Federal Maritime Commission v. Atlantic & Gulf/Panama Canal Zone*, *supra*, 241 F. Supp. at 774-775; *Walling v. Brooklyn Braid Co.*, *supra*, 152 F. 2d at 940941. See also *U.S. v. Feaster*, 330 F. 2d 671, 674 (C.A. 5). The cases cited by the Company to support its contention that the general grant of jurisdiction contained in Section 1337 does not apply where a specific regulatory statute with enforcement procedures is involved, were all suits brought by private parties to review administrative action where the regulatory statutes precluded judicial review, agency action was by law committed to agency discretion, or administrative remedies had not yet been exhausted (Br. 14-16).²⁴ Those cases in no way militate against an agency's right to seek the aid of the courts in carrying out its statutory functions where there is no countervailing Congressional intent to be overcome in establishing district court jurisdiction. Cf. *Leedom v. Kyne*, 358 U.S. 184, 190, 194; *I.A.M. v. Central Airlines, Inc.*, *supra*, 372 U.S. at 690, n. 13; *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-480.²⁵

²⁴ The exception is *Skelly Oil Co. v. Phillips Co.*, 339 U.S. 667 (Br. 14), which is solely concerned with the jurisdiction granted by the Declaratory Judgments Act and has no perceivable relationship to the principles in issue here.

²⁵ In *Leedom v. Kyne*, the general equitable jurisdiction of the district court under 28 U.S.C. Sec. 1337 was held to include jurisdiction to set aside a Board representation determination despite an extensive legislative history demonstrating that "Congress knew that if direct judicial review of the Board's investigation and certification

(continued)

A similar situation was presented in *U.S. v. Feaster*, 330 F. 2d 671 (C.A. 5). There the Fifth Circuit inferred district court jurisdiction to compel the production of records, for the use of the National Mediation Board in conducting a representation investigation, from a section of the Railway Labor Act providing that the Board should have access to records for this purpose, but making no provision for enforcing that right (330 F. 2d at 673, 674; 376 F. 2d at 148-149). In so holding, the court stated (330 F. 2d at 674):

[Defendants] . . . are the persons who, the Government alleges, are resisting the right of the Board to carry out the Congressional mandate.

25 (continued)

of bargaining representatives was not barred, 'the Government [could] be delayed indefinitely before it [took] the first step toward industrial peace.' *Kyne, supra*, 358 U.S. at 192, 194 (dissenting opinion). Because of this legislative history the jurisdiction of the district courts under *Kyne* is limited to situations where the Board has acted "contrary to a specific prohibition in the Act" and where " 'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given.'" 358 U.S. at 188, 190. See *Boire v. Greyhound, supra*, 376 U.S. at 480-481. There is no countervailing legislative policy to be overcome in establishing district court jurisdiction over the present action. Rather, the Board is seeking the aid of the courts in carrying out the Congressional intent that questions of representation be promptly resolved under the procedures adopted by the Board for conducting fair and free employee elections. This distinction is made particularly clear in *U. S. v. Feaster*, 376 F. 2d 147, 148-149, 150-151, nn. 1, 2, 4 (C.A. 5), cert. denied, _____ U.S. _____, 88 S. Ct. 237.

The district court has the power to consider the complaint and if it determines that these defendants are, in fact, in custody of the records, it has the power to enjoin their conduct which denied the access to them which Congress provides the Mediation Board shall have.

* * * *

We think the absence of subpoena power and the absence of a specific enactment in the statute providing that the United States or the Board may file suit to enforce the Board's right to access to the records is not dispositive of the case [citing *Steele v. Louisville & N.R.R. Co.*, 323 U.S. 192; *Virginia R. Co. v. System Federation*, 300 U.S. 515].

So here, Section 9(c) of the Act gives the Board power to establish rules for the conduct of fair employee elections, and the aid of the District Court was enlisted to make that function effective.²⁶ Accordingly, the District Court properly

²⁶ If the Board were remitted solely to the sanction of setting aside elections in which its rule was not complied with, a persistent noncompliance could block a valid election indefinitely, or delay it at will, in contravention of the Congressional policy in favor of the prompt resolution of questions of employee representation. The Company argues that the Board could also enforce its *Excelsior* rule by finding the refusal to comply with the rule a violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory rights (Br. 17-19). But the Board has not yet had occasion to determine whether failure to comply with *Excelsior* constitutes a violation of Section 8(a)(1). When that occasion does arise,

(continued)

found that it had jurisdiction under 28 U.S.C., Sec. 1337 to enforce the *Excelsior* rule, adopted by the Board in the valid exercise of broadly delegated Congressional authority and responsibility.

26 (continued)

the Board should be free to decide the issue on the merits; it should not be compelled to find a violation in order to provide itself with a means for enforcing its election rule. As the Board noted in *Excelsior*, the considerations involved in regulating elections are different from those involved in administering the unfair labor practice provisions of the Act. The test of conduct which may interfere with the "laboratory conditions" for an election is considerably broader than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1) (R. 70, citing *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787; and *General Shoe Corp.*, 77 NLRB 124, 126-127). See *N.L.R.B. v. Shirlington Supermarket, Inc.*, 224 F. 2d 649, 652 (C.A. 4), cert. denied, 350 U.S. 914. See also *N.L.R.B. v. Fresh'nd-Aire Co.*, 226 F. 2d 727, 741 (C.A. 7); *Kearney & Trecker Corp. v. N.L.R.B.*, 210 F. 2d 852, 858-859 (C.A. 7), cert. denied, 348 U.S. 824. Moreover, where a court can give relief, there is no ground for withholding it on the speculation that relief could be obtained by some other method. *American Life Insurance Co. v. Stewart*, 300 U.S. 203, 214. Thus, whether the Board ultimately determines that refusal to comply with its *Excelsior* rule violates Section 8(a)(1) or not, that rule is entitled to enforcement, in its own right, now.

CONCLUSION

For the foregoing reasons we respectfully submit that the District Court properly ordered the Company to file with the Regional Director the names and addresses of the employees in the unit, in compliance with the *Excelsior* rule and the Board's subpoena.

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February 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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No. 21883

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRITISH AUTO PARTS, INC.,

Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

APPELLANT'S REPLY BRIEF.

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FOR THE NINTH CIRCUIT

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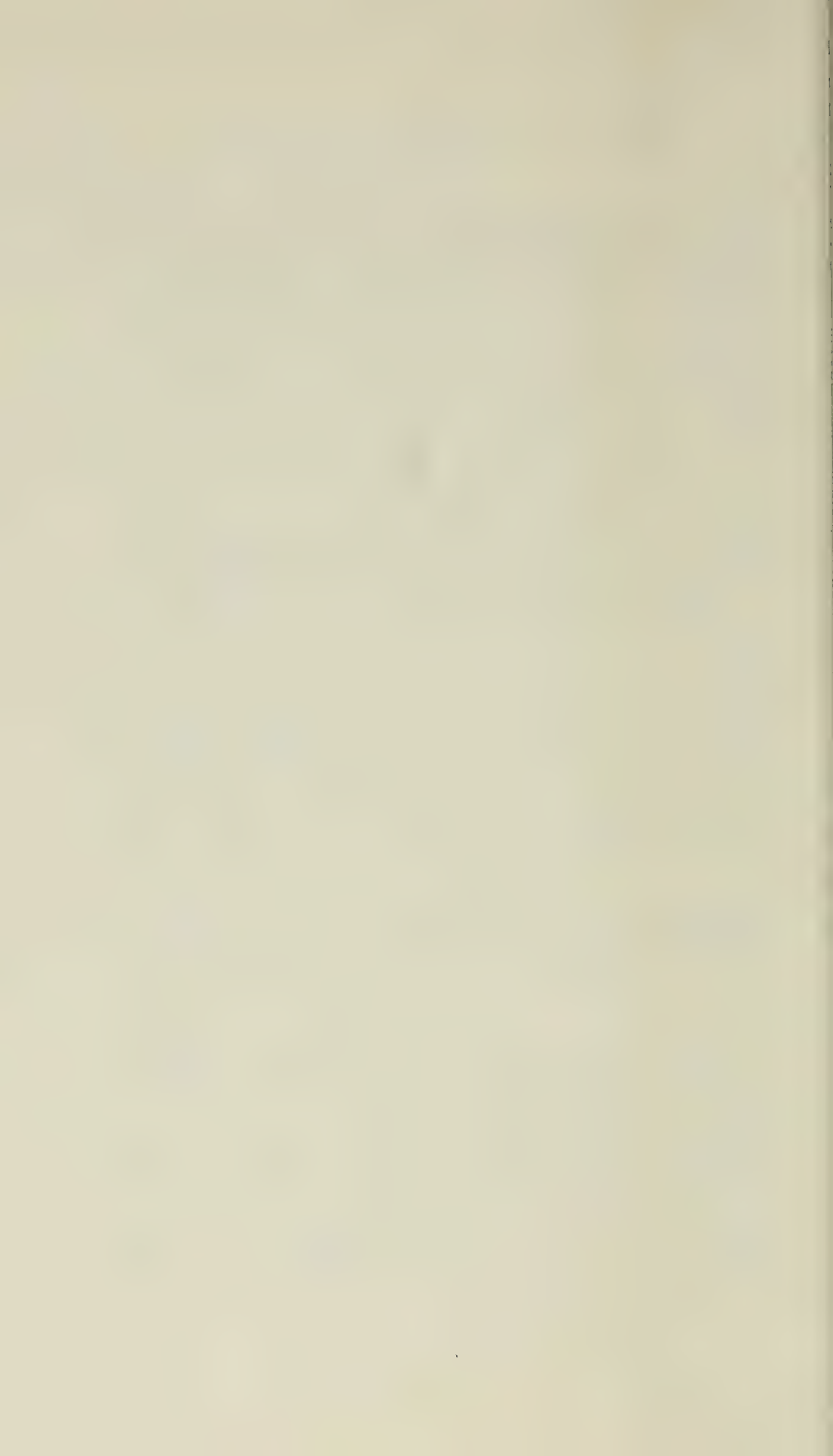
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APPELLANT'S REPLY BRIEF.

ARGUMENT.

I.

**THE EXCELSIOR UNDERWEAR RULE AS APPLIED
TO THE FACTS OF THIS CASE IS INVALID.**

**A. None of the Reasons for the Rule Exist With
Respect to This Case.**

Appellee Board seeks to justify its *per se* application of the rule of its *Excelsior Underwear*¹ decision to the instant case by a recital of the reasons for the rule articulated by it in the *Excelsior Underwear* decision.

The outstanding fallacy with this argument is that none of the articulated reasons for the rule exist with respect to the instant case.

Thus, in this small voting unit of just eight employees, the union organizers had free access to the employer's premises where they personally communicated

¹156 N.L.R.B. 1236 (1966).

with all of the Appellant's employees; they had the opportunity to deliver written literature to each employee; there is no evidence that the Appellant took advantage of its knowledge of their names and addresses to communicate by mail with its employees.

Other facts are equally significant. Under the Board's established procedures, the union had to have signed authorization cards from at least three of appellant's employees before an election could be conducted.² Authorization cards normally provide for the filling in of an employee's name and address.³ It is inconceivable that a union could have the names and addresses of three of eight employees and be unable to obtain them for the remaining five.

Finally, it should be noted that no claim was ever made by the union or the Board to the effect that not being furnished with addresses in this case offered even the slightest hindrance to the union in telling its side of the story to the employees. Thus, the Board cannot justify its *per se* application of the *Excelsior* rule to this case, without so much as even granting a hearing to determine if the facts warranted its application, upon the reasons for the *Excelsior* rule because, they *simply don't exist here*.

B. The Board's Authority to Enact Rules Does Not Sanction Its Interference With Constitutional Rights.

The Board has cited *N.L.R.B. v. A.J. Tower Company*, 329 U.S. 324, 330-331 (1946) for the proposition that it has broad authority to establish rules for the fair conduct of elections. Appellant does not con-

²National Labor Relations Board Rules and Regulations, Statements of Procedure, §101.18.

³See form of authorization card in *Pizza Products Corp. v. N.L.R.B.*, 369 F. 2d 431 (6th Cir. 1966).

tend to the contrary. Appellant does contend that where a Board established rule interferes with an employer's or employee's constitutional rights it is invalid.

Perhaps the best example of such an invalid rule is found in the early attempts of the Board to impose almost complete neutrality upon the employer during a union organizing drive. The courts found no difficulty in holding that these efforts to silence employers from expressing to their employees their opposition to unions constituted a denial of the employer's free speech. *N.L.R.B. v. Virginia Electric & Power Company*, 314 U.S. 469 (1939); *N.L.R.B. v. Ford Motor Company*, 114 F. 2d 905 (6th Cir. 1940).

Likewise, since the Board's *Excelsior Rule* as applied to the facts of this case infringes upon the constitutional rights of appellant and its employees⁴ it is *invalid*.

**1. None of the Other Cases Considering the
Excelsior Rule Are in Point.**

Although the Courts of Appeal for the Fourth and Seventh Circuits have upheld the validity of the Board's *Excelsior* rule in *N.L.R.B. v. Hanes Hosiery Division, Hanes Corporation*, 384 F. 2d 188 (4th Cir. 1967) *cert. den.* U.S. (1968) and *N.L.R.B. v. Rohlen*, 385 F. 2d 52 (7th Cir. 1967), those decisions, even if correct as applied to the facts there considered, have no application to the instant case. This is so for a number of obvious reasons:

1. In neither *Hanes* nor *Rohlen* did the employers have a policy of confidentiality with respect to divulging employees' addresses;

2. In neither *Hanes* nor *Rohlen* were there contracts between employee and employer providing

⁴Pages 20-29, Appellant's Opening Brief.

for non-disclosure of employees' names and addresses;

3. In neither *Hanes* nor *Rohlen* were union organizers given free access to the employers' premises;

4. In *Hanes* there were approximately 4,000 eligible voters and in *Rohlen* approximately 613 eligible voters, while here there were eight;

5. In neither *Hanes* nor *Rohlen* were the employees given the opportunity to exercise their own free choice as to whether or not they wanted to provide their names and addresses to the union. In the instant case *each employee* was provided with properly addressed and posted envelopes and forms for their purpose and all but two employees manifested their desire *not* to provide their address to the union;

6. In *Rohlen* the employer took advantage of having the addresses of its employees to mail written communication to them; whereas there is no evidence that Appellant did so in the instant case.

These six fundamental differences which separate the instant case from *Hanes* and *Rohlen* present sound reasons why their holdings as to the validity of the *Excelsior* rule have no application whatever to the instant case.

Swift & Company v. Solien, 274 F. Supp. 953 (E.D. Mo. 1967) and *N.L.R.B. v. Wolverine Industries Division, Mid-State Metal Products, Inc.*, 64 LRRM 2060 (N.D. Mich. 1966), relied by Appellee⁵ offer no real support for its position in this case for several reasons.

⁵Pages 11, 12, Appellee's Brief. *Contra*: see *N.L.R.B. v. Wilson*, 335 F. 2d 449, 452 (5th Cir. 1964) (sustaining a district court's refusal to order an employer to provide the Board with a list of names and addresses of laid off employees.)

The most compelling reason is that in neither of those cases were the employees given the free choice of whether they wanted their wives and families to be bothered by union organizers, and in neither case did the employees plainly manifest their desire not to be bothered, as they did here.

Indeed, as pointed out by the court in *Swift & Company v. Solien*, *supra*:

“The employees may well have such a right (as by voluntarily closing their eyes, ears and doors to proffered information), but the choice of whether to exercise that right should be *theirs*, not the employer’s.” (274 F. Supp. at 958.) (Emphasis added.)

In the instant case the *employees* exercised *their* right to be free from union harassment by declining to furnish their addresses to the union.⁶ “The right should be *theirs*.” Neither the N.L.R.B. nor this court should force unwanted intruders upon the employees, their families and home life in the face of their clear choice *not to be bothered*.

2. There Is No Justification Whatever for Destroying the Appellant’s and Its Employee’s Contract Rights.

In its opening brief Appellant has pointed out that valid contracts exist between it and its employees providing for the non-disclosure of the addresses of its employees. Appellant has further pointed out that the Board’s attempted application of its *Excelsior* rule in the face of these contracts violates its constitutional

⁶Appellee’s suggestion that the employees may have failed to send in their addresses for “fear of employer reprisal” (Page 11, Appellee’s Brief) is sheer nonsense in view of the plain fact that there was no possible way for the Appellant to learn who sent in their addresses.

rights and the constitutional and statutory rights of its employees.⁷

Appellee first seeks to avoid the force of these agreements by suggesting that no valid agreements exist.⁸ At no time did Appellee ever contest the validity of the contracts of non-disclosure before the District Court. Appellee attempts to raise it for the first time here. This attempt is clearly disposed of by *Carr v. City of Anchorage*, 243 F. 2d 482 (9th Cir. 1957) where the court stated:

“Appellee urges for the first time in this court that the contract is unenforceable, since it was not let on competitive bidding in the manner provided by §§111 and 112 of Article II of the Anchorage General Code of Ordinances. Since this contention was not urged in the trial court, we need not consider it here. *Hebets v. Scott*, 9th Cir., 152 F. 2d 739.” (243 F. 2d at 484.)

Next, Appellee suggests that “. . . it is clear that the company lacks sufficient standing to champion such a right in its ‘employees’ behalf.”⁹ This assertion is completely baseless for the following reasons:

1. It ignores the standing of Appellant to assert its *own* contract rights;
2. It completely misinterprets the holding of *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958). In holding that the N.A.A.C.P. had standing to assert the rights of its members, the court reasoned that to hold otherwise “would result in nullification of the right at the very moment of its assertion.” In the instant case Appellant’s employees

⁷Pages 20-31, Appellant’s Opening Brief.

⁸Page 14, Appellee’s Brief.

⁹Page 14, Appellee’s Brief.

asserted their rights to be left alone by refraining from providing their addresses to the union. To force them to now seek to intervene in these proceedings¹⁰ to reaffirm their position necessarily “would result in nullification of the right at the very moment of its assertion.” Thus, *N.A.A.C.P. v. Alabama* is direct authority for the standing of Appellant to assert its employees’ constitutional rights.

Finally, Appellee glibly asserts that the constitutionally protected contract rights of Appellant must give way to the Board’s *Excelsior* rule. Yet, as was thoroughly discussed in Appellant’s opening brief, an employer’s constitutionally protected property rights will *never* be required to yield to the rights of outside union organizers where alternative means of communication are available. *N.L.R.B. v. Babcock & Wilcox Company*, 351 U.S. 105 (1956).

3. Appellee Offers No Justification for Invading the Employees’ Statutory Rights.

As clearly pointed out in Appellant’s opening brief, its employees were provided with the opportunity to *easily* and *secretly* provide the union with their names and addresses. They exercised their free choice to *refrain* from furnishing them. They thus exercised their right to *refrain* from union activity which is protected by Section 7 of the Act.

Appellee argues that a failure of an employee to provide the union with his name and address is not an exercise of a Section 7 right by quoting a portion of its

¹⁰With its practical impossibility, in view of the costs involved; and the likelihood that in so doing they would be deposed and their addresses thus exposed.

own *Excelsior* decision. Not only is the view expressed in the quoted portion of the *Excelsior* decision¹¹ wrong,¹² but it has no application to the facts of this case where, unlike *Excelsior*, Appellant's employees *were provided with the means to easily and secretly provide their address to the union.*

In *Herman Brothers Pet Supply, Inc. v. N.L.R.B.*, 360 F. 2d 176 (6th Cir. 1966) the court sustained the quashing of a subpoena calling for State Unemployment Insurance records on the grounds of a state policy of secrecy. The right of an individual seeking to be left alone should never be inferior to an abstract policy of secrecy of a state agency.

II.

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENFORCE THE SUBPENA IN THE INSTANT CASE.

Section 11(2) of the Act provides for United States District Court jurisdiction to enter orders requiring a party "to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question . . ."

Appellant has pointed out that since the Appellee seeks a list of names and addresses for the *sole* purpose of turning it over to the union, the thing it seeks is (1) not evidence, and (2) not related to a matter under investigation. Thus the district court was without jurisdiction to enter the order complained of. Appellee

¹¹Page 15 of Appellee's Brief.

¹²See: *Montgomery Ward & Co. v. N.L.R.B.*, 377 F. 2d 452 (6th Cir. 1967) (Holding employee's refraining from answering questionnaire a "protected activity"); *Hunkin-Conkey Const. Co.*, 95 NLRB No. 56 (1951) Holding that an employee's refraining from attending a meeting was "protected activity"; *contra: N.L.R.B. v. Beach-Nut Life Savers, Inc.*, 274 F. Supp. 432 (S.D. N.Y. 1967).

has argued that its subpoena power is broad and in this connection has relied upon a number of court decisions, none of which are in point.

N.L.R.B. v. Northern Trust Co., 148 F. 2d 24 (7th Cir. 1945) upheld the validity of a subpoena which sought financial information about an employer so the *Board could use it* to determine the threshold *issue* present in any Board proceeding of whether the business operations of the employer meet the jurisdictional standards of the Board.

N.L.R.B. v. Duval Jewelry Company of Miami, Inc., 357 U.S. 1 (1958) has nothing whatever with the validity of a subpoena or the class of material which can be subpoenaed.

In *Cudahy Packing Company v. N.L.R.B.*, 177 F. 2d (10th Cir. 1941), the court enforced a subpoena for the employer's payroll records concerning employees in the bargaining unit. The records contained the names of employees which were needed by the Board to decide the issue of voting eligibility. As the court stated: "It [the Company] does not, nor could it, contend that the evidence sought by the Board does not relate to the subject under investigation." (117 F. 2d at 693).

In *N.L.R.B. v. C.C.C. Associates, Inc.*, 306 F. 2d 534 (2d Cir. 1962), the Board subpoenaed data to determine whether a corporation was a successor to another corporation so as to incur the latter's back pay liability.

N.L.R.B. v. United Aircraft Corporation, 200 F. Supp. 48 (D. Conn. 1961), *aff'd.*, 300 F. 2d 442 (2d Cir. 1962), involved a subpoena for employment records which might indicate whether the employer unlawfully discriminated against strikers.

The Board cites *N.L.R.B. v. Friedman*, 352 F. 2d 545 (3d Cir. 1965) to support its contention that

subpenaed information can be turned over to the union. In that case the Board sought certain records of the employer in order to prove that the employer had discriminatorily transferred some of its operations. The employer defended on the grounds that the Board intended to use a union accountant and economist to aid it in analyzing these records. The court found, however, that the garment industry was exceedingly complex and that the Board itself had no experts capable of analyzing the records. Furthermore, the only experts in the entire county were employed by either the employer, its competitors or the union. Under these unusual circumstances, the court enforced the subpoena and allowed the use of a union expert by the Board.

The *Friedman* case is obviously distinguishable on these points: (1) the subpoenaed material was probative of an *issue* to be decided by the Board and was thus clearly "evidence"; (2) the information was to be *used by the Board*, while in the instant case it will be simply turned over to the union for its own use; and (3) since the union was the "charging party" in the *Friedman* case, *it could have subpoenaed the material itself*.

The narrowness of the court's holding in *Friedman* is further demonstrated by the scope of its order. The union accountant and economist was forbidden to reveal the information to anyone except to counsel for the preparation of the unfair labor practice case. The names and addresses of all customers and supplies were also deleted before the records were shown to the union expert. The court added that any deviation from these limitations would be subject to contempt. The *Friedman* case therefore stands for the proposition that such subpoenaed information may not be turned over to the union for its own use, but rather may be given to a union for the purpose of analysis, subject to an ap-

propriate protective order, to aid the Board where such aid is absolutely necessary.

In each one of these decisions relied upon by the Board, it is obvious that the subpoenas in issue (1) *sought only "evidence" in the conventional sense*; (2) *to be used by the Board*; (3) *to enable it to decide issues before it*. None of them lend any support for the validity of the subpoena sought to be enforced here. In fact, since the subpoena sought to be enforced in the instant case (1) does not seek "evidence" in a conventional sense; (2) seeks nothing to be used by the Board; (3) to enable *it* to decide any issue before it, the subpoena in the instant case is, under the authority of these decisions, unenforceable.

Although both the Fourth and Seventh Circuits in *Hanes* and *Rohlen* have held that there is United States district court jurisdiction to enforce a subpoena calling for the names and addresses of an employer's employees, it is respectfully submitted that those decisions are wrong. They are wrong for the simple reason that they have overlooked the fact that the thing ordered to be produced just does not tend to prove, or disprove, or in any other manner, relate to any issue or question to be decided by the Board. The only "matter under investigation" or "in question" at the election stage of these proceedings is whether or not a majority of employees desire to be represented for purposes of collective bargaining by the union. This "matter under investigation" or "in question" is decided *solely* by the ballots cast by the employees. It is not decided by a list of names and addresses. Thus the list does not constitute evidence touching the "matter under investigation" or "in question".

III.

THE DISTRICT COURT IMPROPERLY FOUND THE
PRESENCE OF JURISDICTION UNDER 28 U.S.C.,
§1337.

Appellant has pointed out that United States District Court jurisdiction is specifically limited by statute in representation and unfair labor practice cases.

Where jurisdiction is specifically limited by statute or judicial authority¹³ jurisdiction will not be found to exist by virtue of general language in the same or another statute. This rule of construction is clearly stated in *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204 (1932), where the court pointed out:

“General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. *United States v. Chase*, 135 U.S. 255, 260. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling. *Kepner v. United States*, 195 U.S. 100, 125. In *re Hassenbusch*, 47 C.C.A. 177, 108 Fed. 38. . . . *United States v. Peters* (D.C.), 166 Fed. 613, 615. . . .”

One of the best illustrations of this principle decided by this circuit is found in *In re Judith Gap Commercial Co.*, 5 F. 2d 307 (9th Cir. 1925). In that case the District Court held that it had jurisdiction to remove a trustee in bankruptcy, upon its own motion. It was argued that such jurisdiction existed under the inherent equity powers of the court and Section 2 of

¹³The respects in which United States District Court jurisdiction is so limited are discussed at pages 14-17 of Appellant's opening brief.

the Act of 1898 which provided that nothing in that section shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not therein enumerated.

Yet this court turned to another portion of Section 2 of the Act of 1898 which specifically provided for United States District Court jurisdiction to “. . . upon the complaints of creditors, remove trustees for cause. . . .” This court held that jurisdiction to remove trustees was limited by the specific portion of the statute to removal upon complaints of creditors. It held that there was no jurisdiction to remove a trustee upon the court’s own motion. Thus the decision of the district court was reversed.

The cases cited by Appellee are not in point for the plain reason that in no such case did the question of whether the provisions of a specific portion of the National Labor Relations Act preclude relief under 28 U.S.C. §1337.

Capital Service Inc. v. N.L.R.B., 347 U.S. 501 (1954) involved an injunction by a United States District Court enjoining a state court proceeding where the injunction was “necessary in aid of its jurisdiction” and hence expressly authorized by 28 U.S.C. Section 2283.

N.L.R.B. v. New York State Labor Relations Board, 106 F. Supp. 749 (S.D.N.Y. 1952) was an action in aid of the Board’s exclusive jurisdiction. It did not even involve 28 U.S.C. Section 1337.

Federal Maritime Commission v. Atlantic & Gulf/Panama Canal Zone, 241 F. Supp. 766 (S.D.N.Y. 1965), also involved §1337, but there was no issue as to whether it applied to the case. The main issue was whether a court could issue an injunction to aid an ad-

ministrative agency even though there was no express authorization for such an injunction.

In short, Section 11 of the Act deals *specifically* with the jurisdiction of United States District Courts to enforce subpoenas. Jurisdiction either exists under this section, or it does not. If it does not, Appellee cannot come into court through the back door by relying upon the general terms of another statute.

IV.

CONCLUSION.

Since (1) the court below was without jurisdiction to enter the order appealed from, and (2) the *Excelsior* rule is invalid as applied to the facts of this case because (a) it violates the constitutional rights of appellant and its employees, and (b) it violates the statutory rights of appellant's employees, the decision of the court below should be reversed.

Dated: May 10, 1968.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID A. MADDUX

